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Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR. as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

(a) Reports of the Opinions of the Courts below:

Opinion of Supreme Court, Richmond County, 11 Misc. 2d, 661, 166 N. Y. S. 2d, 751 attached herewith as Appendix A.

Opinion of Supreme Court, Appellate Division, 2nd Department, 5 A. D. 2d 603, 174 N. Y. S. 2d 596, attached herewith as Appendix B.

Opinion of the Court of Appeals of the State of New York, 5 N. Y. 2d 236, 183 N. Y. S. 2d 793, attached herewith as Appendix C.

(b) The Grounds on Which Jurisdiction of The Supreme Court of the United States Is Invoked.

(i) The nature of the proceeding is one for a declaratory judgment brought pursuant to Article 35 of the Civil Practice Act of the State of New York, Section 473, to have declared null and void Section 8 of the Waterfront Commission Act of the State of New York (Laws of 1953, Chapter 882, as amended), and for injunctive relief, as said Section 8 violates the Constitution of the United States.

(ii) The decree sought to be reviewed is the order and judgment of the Court of Appeals of the State of New York dated the 26th day of February, 1959 and entered the 16th day of March, 1959 affirming the judgment of the Appellate Division, 2nd Department which affirmed the judgment of the Supreme Court, Richmond County, dismissing the complaint and denying the injunctive relief requested. The Notice of Appeal was filed on March 25, 1959 in the Supreme Court of the State of New York, Richmond County.

(iii) Jurisdiction of this appeal is conferred on this Court by Title 28 U. S. C. Section 1257(2).

(iv) Cases believed to sustain the jurisdiction of this Court are:

U. S. v. *Lovett,* 328 U. S. 303;
Hill v. *Florida,* 325 U. S. 538;
San Diego Building Trades Council v. *Garmon*— U. S.,—3 L. Ed. 2d, 775;
Slochower v. *Bd. of Ed. of N. Y.,* 350 U. S. 551;
Schware v. *Bd. of Bar Examiners,* 353 U. S. 232;
Konigsberg v. *State Bar of California,* 353 U. S. 252.

(v) The validity of Section 8 of the Waterfront Commission Act of the State of New York is involved.

Text of this statute follows:

> "Collection of Funds for Unions Having Officers or Agents Who are Felons. No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability. As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective bargaining, or of dealing with employers, concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed."

Section 8 can be found in McKinney's Unconsolidated Laws, Section 6700ww, and Laws of New York 1953, ch. 882.

Section 8 of the Waterfront Commission Act conflicts with Section 7 of the National Labor Relations Act, as amended, which follows:

> "Right of Employees as to Organization, Collective Bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [Section 158(a)(3) of this title]."

This section can be found under the Labor Management Relations Act, 1947, U. S. Code 29, Section 157, and in Chapter 120, Public Laws 101, (Section 7).

(c) The Questions Presented by This Appeal.

(1) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Article 6, Clause 2, in that it is repugnant to the laws of the United States, specifically U. S. Code 29, Section 151, *et seq.*, better known as the National Labor Relations Act, as amended, said act, by reason of Section 157, having preempted Section 8 of said Waterfront Commission Act.

(2) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Amendment 14, Section 1, in that it deprives appellant of his right to work at his chosen profession, without notice or hearing of any kind.

(3) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Article 1, Section 10,

Clause 1, in that it imposes punishment for an offense committed prior to its passage and further that it subjects appellant to punishment without a trial.

(d) The Material Facts of the Case.

The appellant, George DeVeau, had been a waterfront employee almost continuously from 1926 to December 1949. He was elected to the office of Secretary-Treasurer of Local 1346 in an election conducted by the Honest Ballot Association, and assumed office on or about January 2, 1950. He was reelected to this position in March 1955.

In 1920, when appellant was 19 years of age, he and another youth converted an automobile valued at about $700 for a "joy ride". A few hours thereafter they were apprehended by the police. On February 27, 1922, both appellant and the other youth pleaded guilty to Attempted Grand Larceny in the First Degree, a felony under the laws of the State of New York. Appellant received a suspended sentence and was placed on probation for five years. There was never any violation of this probation.

In 1953 the Waterfront Commission Act was enacted by the State of New York in compact with the State of New Jersey. The Act, constituting Chapters 882 and 883 of the Laws of the State of New York, is composed of three parts. Part I is the Compact; Part II contains implementing provisions of the Compact; and Part III, which contains Section 8, is New York legislation which was intended to take effect whether or not the Compact was approved by New Jersey. On August 16, 1953, the Congress of the United States consented to so much of the legislation as constitutes the Compact. *The provision herein challenged has never been approved by Congress.*

After the enactment of said Section 8, appellant together with one, Linehan, the President of the Union, moved in

the United States District Court for the Southern District of New York to restrain the District Attorney of the five counties of the City of New York, the Attorney General of the State of New York, the Waterfront Commission of New York Harbor and other State and County officials from enforcement of Section 8 of the Waterfront Commission Act. They also moved to convene a three judge statutory court. *Linehan* v. *Waterfront Commission of New York Harbor, et al.*, 116 F. Supp. 401.

The Attorney General of the State of New York took the position that the statute did not apply to appellant since he was not sentenced to a prison term and consequently was not a person convicted of a felony. The action was dismissed by Weinfeld, District Judge, on the grounds that appellant failed to establish any immediate likelihood of irreparable damage requiring the intervention of a court of equity.

On or about January 18, 1957, appellant received a letter from William V. Bradley, President of the International Longshoremen's Association (Ind.) suspending and, in effect, dismissing him from office. The reason for this dismissal was that other officers of the Union were in jeopardy of prosecution for violation of Section 8 of the Waterfront Commission Act, quoted above, if they continued to collect dues while appellant remained in office of said local.

On or about February 4, 1957, an action was commenced against John M. Braisted, Jr., District Attorney of Richmond County, State of New York, for a declaratory judgment to have Section 8 declared null and void because it conflicts with a statute of the United States, particularly Section 7 of the National Labor Relations Act, as amended and for injunctive relief. This complaint was dismissed by the Supreme Court of the State of New York, Richmond County, with an opinion by Crane, J. (Appendix A here-

with) that Section 8 of the Waterfront Commission Act is not in conflict with Section 7 of the National Labor Relations Act, as amended (fols. 102, 103*). The applicable section of the opinion follows:

> "The plaintiffs' contentions with respect to the constitutional aspects of this case are no longer novel. These arguments have been advanced by the plaintiffs on many occasions and in a variety of forums. As a result, a number of decisions hold, and uniformly so, that section 8 of the Act is not in conflict with section 7 of the National Labor Relations Act."

On appeal to the Appellate Division, in addition thereto, appellant's brief raised the issues that Section 8 constituted a bill of attainder and an ex post facto law and violated due process and therefore was in violation of the Constitution of the United States. The Appellate Division in its opinion (Appendix B herewith), recognized that the Constitutional issues were raised (fol. 156):

> "Appellants' contentions are that section 8 is violative of the Constitution of the United States; that it is void because it conflicts with the National Labor Relations Act (U. S. Code, title 29, secs. 151 *et seq.*), particularly section 7 thereof, * * *."

The Appellate Division decided the Constitutional questions in favor of the validity of Section 8 of the Waterfront Commission Act (fols. 192-193).

All the above questions were again raised on appeal to the Court of Appeals of the State of New York and the decision of the Appellate Division was affirmed by the opinion of the Court of Appeals (Appendix C herewith).

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* Refers to folios in the printed record on appeal in the Court of Appeals in the State of New York.

See also motion papers to Court of Appeals to amend remittitur (Appendix D herewith) and the order of Court of Appeals, (Appendix E herewith), denying said motion because the opinion of said Court shows that upon the appeal Federal Questions were presented and necessarily passed upon.

(e) The Federal Questions Are Substantial.

(1) Section 8 of the Waterfront Commission Act, conflicts with Section 7 of the National Labor Relations Act, as amended.

The National Labor Relations Act, as amended by the Taft-Hartley Act, known as the Labor Management Relations Act, 1947, United States Code 29, Section 151, sets forth in Paragraph 5 the Finding and Policy of the Act as follows:

> "It is hereby declared to be the policy of the the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (July 5, 1935, c. 372, §1, 49 Stat. 449; June 23, 1947, c. 120, Title I, §101 in part, 61 Stat. 136.)" (emphasis supplied)

Congress, by the enactment of the National Labor Relations Act, as amended, has occupied the field in labor relations affecting interstate commerce. In the case of *United Mine Workers* v. *Arkansas Flooring Co.* 351 U. S. 62, the Supreme Court of the State of Louisiana sustained a permanent injunction against peaceful picketing because of the

failure of the officers of the Union to file Non-Communist affidavits. Such filing is a prerequisite to utilization of the National Labor Relations Board. This Court reversed the decision of the lower court and Mr. Justice Burton stated:

> "A 'State may not prohibit the exercise of rights which the federal Acts protect.' Weber *v.* Anheuser-Busch, Inc. 348 U. S. 468, 474, 99 L ed 546, 554, 75 S. Ct. 480, and see Garner *v.* Teamsters, C. & H. Local Union, 346 U. S. 485, 494, 98 L. ed 228, 241, 74 S. Ct. 161."

The case of *Hill* v. *Florida*, 325 U. S. 538, is closely in point with the instant case. In that case, the State of Florida had enacted legislation requiring the licensing of Union business agents. The legislation also provided that no one shall be licensed as a "business agent" of a labor union who has not been a citizen of the United States for more than 10 years, who has been convicted of a felony, or who is not a person of good moral character.

This Court reversed the Florida Supreme Court, stating at page 541:

> "Section 4 of the Florida act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that §4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the workers' judgment.
>
> Thus, the 'full freedom' of employees in collective bargaining which Congress envisioned as essential to protect the free flow of commerce among the states would be, by the Florida statute, shrunk to a greatly limited freedom. No elaboration seems required to

demonstrate that §4 as applied here 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines *v.* Davidowitz, 312 US 52, 67, 85 L. ed. 581, 586, 61 S. Ct. 399; Cloverleaf Butter Co. *v.* Patterson, 315 US 148, 86 L. ed. 754, 62 S. Ct. 491; Napier *v.* Atlantic Coast Line R. Co., 272 US 605, 71 L. ed. 432, 47 S. Ct. 207."

Mr. Chief Justice Stone who concurred in part and dissented in part, in a separate opinion, stated at page 544:

"I concur in so much of the opinion as finds conflict between the licensing provisions of the Florida statute and the National Labor Relations Act. I do so only on the ground that the command of §7 of the National Labor Relations Act that 'employees shall have the right . . . to bargain collectively through representatives of their own choosing' conflicts with the licensing provisions of the Florida Act purporting to fix the qualifications of business agents of labor organizations.

This, of course, does not mean that labor unions or their officers are immune, in other respects, from the exercise of the state's police power to punish fraud, violence, or other forms of misconduct, either because of the commerce clause or the National Labor Relations Act. • • •"

The *Hill* v. *Florida* case was decided in June, 1945. In 1947, two years later, the Congress, by the Taft-Hartley Act, made considerable revisions in the National Labor Relations Act. It is to be noted, however, that nothing was done to change the language of Section 7, nor to give the several states the authority to establish qualifications for union officials. In fact, the only qualification demanded by Congress was that a union official not be a Communist. Even if one were and failed to file a non-communist affidavit, as has been pointed out in the *Arkansas Flooring* case, *supra,* the Union would only be barred from using the facilities of

the National Labor Relations Board. No criminal penalties were prescribed, nor was he barred from acting as a union official.

It is apparent, therefore, that in 1947, Congress did not feel it necessary or desirable to limit the right of workers to bargain through representatives of their own choosing.

Appellant De Veau was chosen by the union members, not once, but twice, and their choice should not be annulled by Section 8 of the Waterfront Commission Act.

The most recent statement by this Court on the question of preemption is in *San Diego Bldg. Trades Council* v. *Garmon*, ... U. S. ....., 3 L. ed. 2d 775, 782 where Mr. Justice Frankfurter stated:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the Taft-Hartley Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."

(2) The Statute Violates the Due Process Clause of the Fourteenth Amendment, is *Ex Post Facto* Legislation and a Bill of Attainder.

The law under consideration, in effect, arbitrarily prevents Appellant, George DeVeau, from pursuing his lawful occupation without benefit of hearing or trial.

The Appellate Division in its opinion, Appendix B, recognized that Appellant was deprived of his position by the action of the District Attorney in the enforcement of Section 8 as if it directly prohibited him from pursuing such occupation (fol. 162):

> "• • • Respondent through the power of his office has in effect forced DeVeau's dismissal from his position. Not only has DeVeau lost his executive post and certain emoluments, but the local and its members have lost him as a representative."

There is no question that notice and the right to be heard are essential elements of due process.

Mr. Justice Frankfurter, in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U. S. 123 at page 168, stated:

> "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. Regard for this principle has guided Congress and the Executive. Congress has often entrusted, as it may, protection of interests which it has created to administrative agencies rather than to the courts. But rarely has it authorized such agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process."

See also, 12 Am. Jur. Const. Law Sec. 573.

The right to work in one's chosen field is included in the constitutional protection of due process.

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of

the Amendment to secure. Butchers' Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Barbier *v.* Connolly, 113 U. S. 27, 31, 28, L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo *v.* Hopkins supra; Allgeyer *v.* Louisiana, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Coppage *v.* Kansas, 236 U. S. 1, 14, 59 L. ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240." *Truax* v. *Raich*, 239 U. S. 33, 41.

See also *Goldsmith* v. *Board of Tax Appeal*, 270 U. S. 117.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Dent *v.* West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 S. Ct. 231. Cf. Slochower *v.* Board of Education, 350 U. S. 551, 100 L. ed. 692, 76 S. Ct. 637; Wieman *v.* Updegraff, 344 US 183, 97 L. ed 216, 73 S. Ct. 215." *Schware* v. *Board of Bar Examiners*, 353 US 232, 238.

See also *Konigsberg* v. *State Bar of California*, 353 U. S. 252.

Mr. Justice Chase, in the case of *Calder* v. *Bull*, 3 Dall. 386, 1 L. ed. 648, defined an *ex post facto* law as one that punishes as a crime an act done before its passage and which when committed was not punishable: an act that aggravates a crime or inflicts a greater punishment than the law annexed to it when committed or a law that alters the rules of evidence in order to convict an offender.

Undoubtedly, Section 8, in its applicability to Appellant, inflicts additional punishment by depriving him of his right to work and does so without benefit of hearing or trial, making it both a bill of attainder and an *ex post facto* law.

This Court has held that a state may, in the exercise of its police power, prescribe qualifications for one engaged in the practice of medicine. *Hawker* v. *State of New York*, 170 U. S. 189. The reasoning of the Court (pages 193-194) follows:

> "Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished."

A union officer cannot be placed in the same category as a doctor or other professional. He does not have the intimate relationship with the general public that a doctor, lawyer or other professional may have. Assuming that a union officer is on a par with the professional, Section 8 of the Waterfront Commission Act does not bar him because of his lack of character. It is not a licensing statute.

Respondent in its brief in the Court of Appeals of the State of New York, at page 12, stated:

> "A union official or delegate may have been arrested innumerable times; he may have been convicted of countless misdemeanors; his reputation in the community may be the most reprehensible, so as to bar him from any and all licensed occupations and professions in our state, but if he has not been convicted of a felony, Section 8 of the Waterfront Commission Act will not apply."

It is readily apparent that lack of good moral character is not the basis of the prohibition of Section 8, and that Section 8 constitutes an arbitrary abuse of the police power.

A state may, according to the rationale of *Hawker* v. *State of New York, supra,* require that a physician have good character, and it may determine as conclusive that one who has been convicted of a felony lacks good character. However, there was a very strong dissent by three justices of this Court. At pages 204, 205, Mr. Justice Harlan stated:

> "The statute in question, it is to be observed, takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practice medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed." • • •
>
> • • • "The law under which this appellant was indicted does not deal with his present moral character. It seizes upon a past offense and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies, not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of prac-

ticing at all. Clearly, it acts directly upon and enhances the punishment of the antecedently committed offense by depriving the person of his property and right, and preventing his earning his livelihood in his profession, only because of his past, and in this case expiated, offense against the criminal law. This prisoner has committed no new crime except that which the statute has created out of the old one. He had absolutely the right to practice medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away from him his property in the right to earn his living on the expiration of his imprisonment by engaging in the profession of which he was and is a member."

Assuming arguendo, that the basis of Section 8 is lack of good character, then we believe that the time is ripe for this Court to reconsider the decision in *Hawker* v. *State of New York, supra,* which was decided over sixty years ago and that this Court should reverse that decision.

To hold that because a man once committed a felony, he will lack good character as long as life lasts is unsound reasoning and against all the tenets of American justice and fair play.

Conclusion.

Probable jurisdiction should be noted.

May 19, 1959.

Respectfully submitted,

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Appendix A.

Opinion of Crane, J.

This is an Article 78 proceeding which turns solely upon the question whether or not an officer of a waterfront union who pleaded guilty to a felony and received a suspended sentence, is to be considered convicted within the meaning of the term as it is used in Section 8 of Part III of the Waterfront Commission Act. New York Laws, 1953, c. 882, 883; McKinney's Unconsolidated Laws, Section 6700-ww). In substance, this section provides that a union representing waterfront employees cannot collect dues from its membership if an officer or agent of such labor organization has been convicted of a felony.

Plaintiffs seek relief by way of an injunction to restrain the district attorney of the County of Richmond from enforcing Section 8 of the above Act. The defendant district attorney, supported by the Waterfront Commission as amicus curiae, cross-moves to dismiss the complaint, or in the alternative, for judgment on the pleadings in that the complaint fails to state facts sufficient to constitute a cause of action.

The gravamen of the complaint is predicated upon the following undisputed facts. Plaintiff, De Veau, an officer of plaintiff, Local 1346 of the International Longshoremen's Association, plead guilty to attempted grand larceny in the first degree in the Court of General Sessions, New York City, in 1922. The crime was then, and now is, a felony. Following his plea of guilty, the court suspended sentence. Acting upon the complaint of the Waterfront Commission of New York Harbor, the defendant district attorney notified the plaintiff union that as long as De Veau remained in its employ as an agent, the union was forbidden by Section 8 of the Waterfront Commission Act to collect dues. The union suspended De Veau. The plaintiffs contend that without De Veau as an officer, the ability of the union to act as a collective bargaining representative is

impaired and that because of his removal, De Veau, himself, is damaged financially and otherwise.

Plaintiffs assert, first, that the provisions of section 8 of Part III of the Waterfront Commission Act are void because this section is in direct conflict with section 7 of the National Labor Relations Act, as amended, and secondly, that a plea of guilty to a felony, followed by a suspension of sentence, does not constitute a conviction within the meaning of the term as it is used in section 8 of the act. This section reads as follows:

> "Collection of Funds for Unions Having Officers or Agents Who Are Felons. No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability. As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective bargaining, or of dealing with employers, concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed."

Section 7 of the National Labor Relations Act, as amended, provides:

> "Right of Employers as to Organization, Collective Bargaining, etc. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

The plaintiffs' contentions with respect to the constitutional aspects of this case are no longer novel. These arguments have been advanced by the plaintiffs on many occasions and in a variety of forums. As a result, a number of decisions hold, and uniformly so, that section 8 of the Act is not in conflict with section 7 of the National Labor Relations Act. (*I. L. A. et al.* v. *Hogan*, 3 Misc., 2d, 893, October, 1956, Supreme Court, Special Term, New York County, Hecht, J.; *Hazelton* v. *Murray*, 1956, 21 N. J., 115; *S. I. Loaders* v. *Waterfront Comm'n*, 117 Fed. Supp., 308, aff'd 347 U. S., 439; *Bradley* v. *Waterfront Comm'n*, 130 Fed. Supp., 303).

In *I. L. A. et al.* v. *Hogan* (cited *supra*), upon almost identical facts and issues, and with only one change among the principals cast as parties, Mr. Justice Hecht held, and this court agrees, that the limitation imposed by section 8 of the Waterfront Commission Act on the right of the union to collect dues is not in conflict, constitutional or otherwise, with any of the rights granted to collective bargaining agents under section 7 of the National Labor Relations Act.

However, the plaintiffs argue that unlike the *Hogan* case, where the plaintiff Schultz was an appointed agent, plaintiff De Veau herein, was elected to union office. This distinction between the cases is insufficient to create a difference. Were this distinction accepted by this court, it would merely serve to defeat the statutory intent, not further it. Section 8 refers without qualification to "any officer or agent." This statutory phrase is absolute in its sweep. To shear elected union officials from its operation would be to nullify in one stroke much of the effect of the section itself, as well as to be inconsistent with the broad nature of the plan established by the act to control crime and corruption on the waterfront.

The plaintiffs' remaining contention that the use of the term "conviction" in section 8 of the Act does not apply of De Veau is also without merit.

An examination of section 8, whether standing alone, or as part of the entire text of the Act, makes the plaintiffs' position untenable. The section is both explicit as to those whom it includes and comprehensive as to the manner of their treatment. The meaning of the term "conviction" in this section is consonant with its use as it is found elsewhere in the Act.

Significantly, section 8, even when taken by itself, presents a well ordered plan to curb corruption on the waterfront by the effective means of depriving a union of access to revenue where its officers or agents have been convicted of crime, unless the person in question has received a governmental pardon or a certificate of good conduct from the parole board acting under the Executive Law. The imposition of a suspended sentence, following a plea of guilty to a felony, is not the equivalent of a governmental pardon or a certificate of good conduct, the available relief to a conviction so precisely enumerated in the statute.

The New York State Crime Commission in its Fourth Report (Leg. Doc. No. 70, 1953), was keenly aware of the realities of venality and hoodlumism in the waterfront when

it exposed many union officials as often arrested but seldom convicted. Thus, in discussing the *Harold Bowers* case as one among many, the commission found:

> (b) Harold Bowers was appointed by Ryan as an ILA organizer for the North River area in July, 1951. Bowers, alias Frank Donald, has been arrested on four occasions charged with such offenses as robbery, possession of a gun, grand larceny (twice) and congregating with known criminals (Ex. 45). Bowers still continues both as a paid organizer and as a financial secretary (2230). Dominick Genova, a former member of Local 824, testified that Harold Bowers was a member of the gang in control of the upper North River piers headed by Harold's cousin, Michael (Mickey) Bowers, a convicted bank robber (2153-2154)." Page 21.

The Waterfront Commission Act, itself, reflects concern with the known waterfront racketeers who escaped conviction. To quote from the summary of the Waterfront Commission Act, prepared by the representatives of the State Crime Commission of New York and New Jersey, the Port of New York Authority and the Governor's offices of New York and New Jersey:

> "In the light of the Crime Commission's disclosures of the activities of known waterfront gangsters who have so far escaped being convicted of crime, provision has been inserted to permit the Commission to deny registration as a longshoreman, whose presence on the piers to other waterfront terminals in the port of New York district is found by the Commission on the basis of facts and evidence before it, to constitute a danger to the public peace or safety" (Supplement to McKinney's Unconsolidated Laws, page 56).

Thus, where the Legislature, by investigation and by statute, has expressed such rightful concern with known individuals who have escaped conviction so often despite their frequent skirmishes with the law, a plea of guilty followed by suspended sentence, rightfully must be considered a conviction. To hold otherwise would be to confer benefits where none was intended.

Examining other sections of the act, it is clear that a conviction is not negated, nor its effect nullified, because it is followed by a suspended sentence. On the contrary, whenever the Legislature used the term "conviction" in the act, and with it, the phrase, "suspension of sentence," the terms, as so used, constitutes the equivalent of punishment, not its abrogation.

Thus, to be eligible to work, a pier superintendent, hiring agent and stevedore, who has been convicted of a particular crime, must prove his good behavior over a five-year period, measured either from the date of the actual termination of the sentence, or the payment of a fine, or the suspension of sentence (sec. 6700-ee-ff).

As so used, the suspension of sentence is equated with punishment, whether it be the actual termination of sentence or the payment of a fine. It is fair to assume that the Legislature did not intend to impose one standard upon stevedores, hiring agents and pier superintendents, and another upon union officers and agents. If such were the case, it would be reasonable to suppose that the more stringent standards would fall upon the union officers and agents or those who, as the Crime Commission found, acted in a fiduciary relationship and held a position of trust and responsibility with unlimited access to the funds of the membership and no effective methods of accountability.

In further support of its position, the plaintiffs urge that in *People* v. *Fabian* (192 N. Y., 443), the Court of Appeals held that a plea of guilty to a felony, followed by a suspended sentence, did not constitute a judgment of

conviction which would bar the right to vote. The plaintiffs also rely upon such cases as *People ex rel. La Placa* v. *Murphy* (277 N. Y., 581), where the court held in a memorandum opinion that there was no conviction as a fourth felony offender within the meaning of the Baumes Law because a sentence previously imposed as a third felony offerder was followed by the suspension of the execution thereof. To the same effect: *People ex rel. Marcley* v. *Lawes* (254 N. Y., 249).

These cases adhere to the general rule as stated in *Richetti* v. *N. Y. Board of Parole* (300 N. Y., 357, 360):

> "We have had occasion to point out that the word 'conviction' is of equivocal meaning and that the use of the term may vary with the particular statute involved. It presents a question of legislative intent."

These decisions, and others which follow them, are strong authority for the plaintiffs' position. However, the Court of Appeals has taken an opposite course, holding elsewhere that one who is guilty of a felony, and who receives a suspended sentence, nevertheless stands convicted.

Thus, in a leading case *Weinrib* v. *Beier* (294 N. Y., 628, motion to reargue denied, 295 N. Y., 657), the petitioner, a dentist, pleaded guilty to a felony and received a suspended sentence. Under the Education Law his license to practice dentistry was thereupon canceled upon the ground that he had been convicted of a felony. The Court of Appeals held that although he had received a suspended sentence, he, in fact, had been convicted within the meaning of the statute, and hence, his license had been properly revoked.

The court stated, and it is instructive to quote at length:

> "We have presented to us the problem of deciding the meaning of the words 'convicted of felony' in

that particular section of the Education Law. It has been said 'that the question whether the word "conviction" in any particular statute shall be taken to include a suspended sentence, is one of legislative intention' (*People ex rel. Marcley* v. *Lawes*, 254 N. Y., 249, 254). Again, we have said in *People* v. *Fabian* (192 N. Y., 443, 449): 'This use of the term "convicted," with varying meanings, even in the same statute, and extending right down to the immediate present, certainly demonstrates that there is no fixed signification which the courts are bound to adopt, and leaves us the utmost freedom of inquiry as to what was intended when the legislature was empowered to disfranchise convicted citizens.' We have, upon occasion, interpreted the word 'conviction' to mean a verdict or plea of guilt. *Matter of Lewis* v. *Carter*, (220 N. Y., 8), where in construing Prison Law, section 211, we said (p. 16): 'The word "convicted" or "conviction" is of equivocal meaning. It may mean the adjudication of guilt whether by plea, finding or verdict. It may mean the adjudication and the judgment or sentence.' See, also, *People ex rel. Spurio* v. *Foster* (293 N. Y., 820) construing section 219 of the Correction Law. In a disciplinary proceeding against a member of a profession, where the latter confesses in open court by formal plea of guilt the commission of a felony, it seems to us that the Legislature clearly intended that such plea constituted conviction of a felony, even through probation followed rather than commitment to prison" (p. 631-2).

Under the foregoing reasoning, the purpose of the statute does much to determine the meaning of its terms, and to resolve areas of ambiguity which may arise in their use. Thus, where the Legislature has failed to specify that a suspended sentence following a plea or verdict of guilty, con-

stitutes a conviction, and a defendant stands facing a long term of imprisonment, the defendant cannot rightfully be expected to suffer the loss of his liberty as a consequence of the Legislature's silence. Appropriately then, the Legislature, when it irrevocably deprives an individual of a basic right, such as his freedom, or denies him the equally fundamental right to vote, must do so by terms explicit. Omission is not enough.

In contrast, where a dentist, or one similarly situated, loses his license to practice, although obviously, this is a serious result, the privilege lost is no more than incidental. His license to function in this one particular field, a right given to him by the state, is now withdrawn because of his own misconduct. His ability to earn a living has been narrowed but not terminated (see *Barsky* v. *Board of Regents, &c.*, 305 N. Y., 89, aff'd 347 U. S. 442).

In connection with the above distinction, the opinion of the attorney-general for 1950, at page 110 states:

> "All of the other statutes mentioned in your inquiry fall in an area between the *Fabian* and *Weinrib* cases in which there has been no specific determination * * *. The Legislature has furnished no guide to its intention by using in all cases the same bare words 'convicted' or 'conviction,' as were construed differently in the *Fabian* and *Weinrib* cases. None of the statutes now under consideration involves a professional pursuit, but each of them requires the effective grant of a license from the State as a condition of the privilege of engaging in regulated occupations or activities ranging from that of Notary Public to Insurance Adjuster. Disability upon felony conviction is a disqualifying or disciplinary factor in each. For these reasons, I believe that the rule of the *Weinrib* case is applicable, rather that the *Fabian* case which insisted upon a technical judgment of conviction before loss of one of the rights of citizenship would ensue" (p. 112).

Upon a careful evaluation of the competing considerations, including particularly the nature and background of the Waterfront Commission Act itself, it is clear that the *Weinrib* decision, and not the *Fabian* case, applies here. The state is not required to obtain a technical judgment of conviction in order to deny individuals in professional fields or other occupations from continuing in their particular livelihood (Medicine, Education Law, sec. 6502; Dentistry, id., sec. 6613, subdiv. 12; Nursing, id., sec. 6911, subdivision 1(e); Podiatry, id., sec. 7011, subdiv. 1(a); Optometry, id., sec. 7108, subdiv. 1; Engineering and Surveying, id., sec. 7210, subdiv. 1(e); Architecture, id., sec. 7308, subdiv. 1(e); Certified Public Accounting, id., sec. 7406, subdiv. 1(c)).

Such is the case here, and plaintiff De Veau, as one convicted within the meaning of section 8 of the act, loses his right to act as a union officer.

This decision holding section 8 of the act constitutional, and De Veau convicted within its meaning, does not leave him without recourse. The statute itself provides channels for relief, and the plaintiff is free to pursue them before the proper authorities.

Accordingly, the plaintiffs' application for an injunction pendente lite together with the plaintiffs' cross-motion for judgment on the pleadings, is denied. The defendant's motion for judgment dismissing the complaint and for judgment on the pleadings in his favor is granted.

Settle order on notice.

Appendix B.

Opinion of Appellate Division—Second Department.

(Reported in 174 N. Y. S. (2) 596).

Present:

NOLAN, P. J.; WENZEL, UGHETTA, HALLINAN and KLEINFELD, JJ.

WENZEL, J.:

Appellants challenge the validity of section 8 of the Waterfront Commission Act (Laws of 1953, chap. 882, as amended), the interpretation thereof by respondent, and the action taken by him based thereon which led to the dismissal of appellant De Veau as secretary-treasurer of the labor union known as Local 1346 of the International Longshoremen's Association (Ind), hereinafter referred to as the local. De Veau and his two co-appellants brought this action in their individual capacities and as members of the local, and on behalf of all other members of the local seeking a declaratory judgment and injunctive relief.

So far as material, section 8 states that "No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability."

According to the complaint, De Veau had been secretary-treasurer of the local for some time up to January 17, 1957, and was on that day suspended from his office by the president of the parent organization of the local (the

parent organization shall hereafter be referred to as the ILA) because of a threat by a certain assistant district attorney in respondent's office that he would commence a prosecution based on section 8 and a conviction of De Veau in 1922 in the Court of General Sessions in the County of New York of the crime of attempted grand larceny in the first degree which conviction was had upon De Veau's plea of guilty. The complaint further alleges that De Veau received a suspended sentence and was "paroled" [sic] for five years; that he complied with the conditions of the "parole" [sic]; that he was last re-elected to his said office in 1955, prior to the said action taken by the president of ILA, and the membership of the local re-elected him at that time with knowledge of his said 1922 conviction; that his services as an agent of the local are valuable to the local, and that he himself has been damaged by the termination of his employment in that he was deprived of his right to continue in the employment and has lost certain substantial welfare benefits and pension rights.

Respondent admits in his answer that the assistant district attorney in question advised the president and other ILA representatives of De Veau's said conviction and of the provisions of section 8.

Appellants' contentions are that section 8 is violative of the Constitution of the United States; that it is void because it conflicts with the National Labor Relations Act (U. S. Code, title 29, secs. 151 et seq.), particularly section 7 thereof, and that the 1922 conviction is not a conviction within the intendment of section 8 in view of the fact that sentence had been suspended and therefore no judgment of conviction was rendered.

In limine, disposition must be made of respondent's argument that the court does not have jurisdiction of this action. The remedy of an action for a declaratory judgment (Civil Practice Act, sec. 473) "is applicable in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact

is involved'' (Dun & Bradstreet *v.* City of N. Y., 276 N. Y. 198, 206). Of course, there must be a real controversy, involving substantial legal interests, and the defendant must be in a position to place the plaintiff's rights in jeopardy (22 Carmody-Wait on New York Practice, pp. 713-717). Resort to this remedy and also to that of an injunction may be had even with respect to penal statutes and against a public official or public agency whose duty it is to conduct appropriate prosecutions if the purpose be to avoid irreparable injury and if the sole question is one of law (Reed *v.* Littleton, 275 N. Y. 150; Mills Novelty Co. *v.* Sunderman, 266 N. Y. 32; New York Foreign Trade Zone Operators *v.* State Liquor Authority, 285 N. Y. 272; Aerated Products Co. of Buffalo *v.* Godfrey, 263 App. Div. 685, rev'd on other grounds, 290 N. Y. 92). One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis of a threatened prosecution for crime without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution (N. Y. Foreign Trade Zone Operators *v.* State Liquor Authority, *supra*, p. 278).

In previous action, similarly brought to test the validity of this very section 8, it was recognized that the remedy of an action for declaratory judgment was appropriate (Linehan *v.* Waterfront Comm'n of N. Y. Harbor, 116 F. Supp. 401, 405 [De Veau was also a plaintiff in this cited case]; Internat. Longshoremen's Ass'n. Ind., *v.* H[illegible]n, 3 Misc. 2d 893) and in the case last cited, and in other cases in which the validity of all or portions of the act was attacked, it was also recognized that an action for an injunction would be a proper remedy (Staten Island Loaders *v.* Waterfront Comm'n of N. Y. Harbor, 117 F. Supp. 308, aff'd 347 U. S. 439; Linehan *v.* Waterfront Comm'n of N. Y. Harbor, 116 F. Supp. 683, aff'd 347 U. S. 439; Bradley *v.* Waterfront Comm'n of N. Y. Harbor, 130 F. Supp. 303; O'Rourke *v.* Waterfront Comm'n of N. Y. Harbor, 118 F. Supp. 236).

The facts presented in the record establish ample basis for the court at least to consider the legal questions which are posed. Respondent, through the power of his office, has in effect forced De Veau's dismissal from his position. Not only has De Veau lost his executive post and certain emoluments, but the local and its members have lost him as a representative. Neither the local nor the ILA chose to challenge respondent's position and it does not appear that De Veau or anyone else has any remedy against the local or the ILA or their officials.

The question as to whether violation of section 8 is indeed a crime or offense, and whether respondent indeed could have prosecuted a violator of the section, has not been raised and we do not pass on it. However, certain observations will be made hereinbelow as to that question, after first reviewing the aspects of the Waterfront Commission Act which are salient on the issues which have been raised.

The act is divided into three parts. Part I contains but one section (sec. 1). It is a restatement of a compact (the Waterfront Commission compact) which had been entered into between the States of New York and New Jersey and has been approved by the Congress (67 Stat. 541). It contains sixteen articles. Article I sets forth findings and declarations as to certain evil conditions and practices that had prevailed with respect to waterfront labor within the Port of New York district. Succeeding articles create a Waterfront Commission of New York Harbor as the agency to administer the laws regulating waterfront activities, prohibit persons from working or engaging in certain occupations (pier superintendent, hiring agent, port watchman and stevedore) without a license obtained from the commission and in another occupation (longshoreman) unless they have been included in the longshoremen's register established by the commission. Consistent with the manifest intent in section 8 to prevent the existence of any influence of convicted felons upon the waterfront, waterfront labor and related matters, these articles also provide that

no such license shall be granted to a person who has been convicted of a felony, subject to a right given to the commission, where application is made for a license as pier superintendent, hiring agent or stevedore, to remove the ineligibility by reason of such conviction upon satisfactory evidence that the conduct of the license applicant in question for a period of not less than five years has been such as to warrant the grant of the license, and that the five-year period "shall be measured either from the date of payment of any fine imposed upon such person or the suspension of sentence or from the date of his unrevoked release from custody or parole, commutation or termination of his sentence." The same right to remove this ineligibility, where application is made for a license as a port watchman, was also given to the commission by subsequent legislation in section 5-j of the act (Laws of 1954, chap. 220), and by still later legislation the right to work as a checker was similarly denied to persons convicted of felony, subject to the similar power given to the commission to remove that basis of ineligibility (Laws of 1957, chap. 188). The verbiage of these provisions, that is, the context relating to the word "convicted," is substantially the same as that in section 8, except that section 8 does not give the commission any power to remove the application of the prohibiting provisions therein and accordingly does not contain the provision regarding the measuring of any period of time from a suspension of sentence.

When the act was originally passed in 1953, Part II consisted of sections 2 to 5, inclusive, which dealt with matters respecting the administration of the commission, and Part III consisted of sections 6 to 12, inclusive, which contained further policing provisions, supplementing the compact and including the disputed section 8.

Coming back to the question of whether violation of section 8 is a crime or an offense, it should first be noted that neither the section itself nor any other provision in the act states that violation of its provisions is a crime or any

offense for which the violator could be prosecuted. The only provisions in the act which pertain to prosecutions, penalties and remedies for violations of the act, apart from the provisions as to revocation or suspension of licenses or removal of registration or other disciplinary action against licensees and registered persons are contained in Article XIV of section 1 and in sections 4, 5-d, 5-e and 5-f. Article XIV and section 4 by their own terms do not apply to section 8. Article XIV affords the remedy of punishment as for contempt for violation of the mandate of a subpoena to attend a hearing before the commission (subdiv. 1) states that the giving of false testimony at such hearing or the making or filing of a false or fraudulent report or statement required by the compact to be made or filed under oath is a misdemeanor (subdiv. 2) and states that violations of, or conspiracies to violate, any other provision of the compact, and certain other conduct with reference to longshoremen, shall be punishable as may be provided for by concurrent action of the Legislatures of New York and New Jersey (subdivs. 3, 4, 5). Section 4 states that violation of any of the provisions of the compact or of section 2 of the act is a misdemeanor if no other penalty is prescribed. Section 5-d states that the giving of false testimony in any investigation, interview or proceeding conducted by the commission is a misdemeanor. Sections 5-e and 5-f give the commission civil rights to bring actions for penalties and to proceed by "mandamus, injunction or action or proceeding in lieu of prerogative writ."

Disobedience of a statutory prohibition is not a crime unless some statute so prescribes (Penal Law, sec. 22; People *v.* Fein, 292 N. Y. 10, 14; People *v.* Knapp, 206 N. Y. 373, 380-381; People *v.* Freres, — App. Div. 2d —, Second Dept., March 3, 1958) an act is not a crime unless the Legislature has, in addition to forbidding it, imposed a punishment for its commission (Penal Law, sec. 2, People *v.* Freres, supra; People *v.* Conti, 127 Misc. 244, 249). As has been indicated in the paragraph just above, section 8

does not provide that violation of its provisions is a crime, and the other provisions of the act which have also been discussed in that paragraph do not apply to that section. Accordingly, violation of section 8 is a crime only if made so by section 29 of the Penal Law which provides: "Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor." Whether section 29 has that effect deserves immediate and serious attention by all parties interested in activities in the Port of New York district and by all parties interested in law enforcement. Their attention is invited to the following authorities which might be considered as supporting the view that section 29 has such effect (Gardner *v.* People, 62 N. Y. 299; Marra *v.* N. Y. Central & Hudson River RR., 139 App. Div. 707; People *v.* Bogart, 3 Abb. Prac. 193) and to the following authority which might be considered as supporting the contrary view (People *v.* Freres, supra). As stated hereinabove, we do not pass on the question on this appeal.

We turn now to the question of the interpretation which should be given to section 8. It is the contention of appellants that since no judgment of conviction was ever rendered against De Veau because sentence had been suspended (see People *v.* Shaw, 1 N. Y. 2d 30, 32) he has not been convicted of a felony within the contemplation of section 8.

"The word 'conviction' is of equivocal meaning" and its use in a statute "may vary with the particular statute involved. It presents a question of legislative intent" (Matter of Richetti *v.* New York State Board of Parole, 300 N. Y. 357, 360; see, also, Matter of Weinrib *v.* Beier, 294 N. Y. 628; People ex rel. Marcley *v.* Lawes, 254 N. Y. 249; People *v.* Fabian, 192 N. Y. 443; Linehan *v.* Waterfront Comm'n of N. Y. Harbor, 116 F. Supp. 401, supra).

In People *v.* Fabian (supra) provisions in the State Constitution of 1894 and in the then extant Election Law, with respect to denying the right of suffrage to persons con-

victed of a felony, were involved and in People *v.* Shaw (supra) and People ex rel. Marcley *v.* Lawes (supra) Penal Law provisions with respect to imposing increased punishment for felonies committed by persons who had been convicted two or three times previously were involved. In these cases the word "convicted" was held not to include a conviction upon which sentence had been suspended. On the other hand, in other statutes references to convictions have been held to include convictions upon which sentence had been suspended. Such holdings were made in Matter of Lewis *v.* Carter (220 N. Y. 8) where the statute was a provision in the Prison Law (now the Correction Law) withholding power from the board of parole to release on parole certain prisoners if they had a prior conviction, and in Matter of Weinrib *v.* Beier (supra) where the statute was a provision in the Education Law with respect to forfeiture of a license to practice dentistry if the licensee were convicted of a felony.

The theory upon which the interpretation that is favorable to the convicted person has been applied is, as reiterated in Fabian (supra, pp. 449-450), that " 'where disabilities, disqualifications and forfeiture are to follow upon a conviction, in the eye of the law, it is that condition which is evidenced by sentence and judgment; and that where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended or postponed temporarily or indefinitely, so, also, the indirect consequences are likewise postponed.' " The cases in which the interpretation unfavorable to the convicted person has been applied were based on the flat conclusion that statutes in pari materia require that interpretation (see Matter of Lewis *v.* Carter, supra) or that—this as to a statute which requires the disciplining of a member of a profession because of his conviction of a felony—the Legislature intended that a plea of guilty to a felony was included (see Matter of Weinrib *v.* Beier, supra).

In our opinion there is sufficient kinship between the barring of a member of a profession from practicing his

profession and the barring (here indirectly) of a person from serving as an official of a labor union, to require us to hold that the rule in the latter instance ought to be the same as in the former, even without special indication to such effect in the pertinent statutes, that is, that a "conviction," which is the basis for the barring, includes a conviction upon which sentence has been suspended.

Moreover, pertinent provisions in the Waterfront Commission Act afford affirmative evidence that this interpretation was intended by the Legislature in section 8. In the cases of pier superintendents, hiring agents, port watchmen, stevedores and checkers, the Legislature clearly indicated that "conviction" included a conviction with suspension of sentence, since it provided that the five-year period which could serve as the basis for removal of the ineligibility by reason of a conviction was to be measured, where sentence had been suspended, from the date of the suspension of sentence. The principle of ejusdem generis has apt application, there appearing to be no reason to say that the Legislature intended to use the word "conviction" in any different sense with reference to labor union officials. It would be incomprehensible to us to say that a conviction with suspended sentence was intended as a barrier to a laborer's right to work on the waterfront, but not as a barrier to a union official who by reason of his position undoubtedly would have more influence on affairs on the waterfront than the waterfront laborer.

It is, therefore, our conclusion that De Veau has been convicted of a felony within the meaning of the provisions of section 8.

Passing on to appellants' contention that section 8 is in conflict with the National Labor Relations Act (U. S. Code, title 29, secs. 151 et seq.), particularly section 7 thereof, that section, so far as pertinent, states: "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" (ibid., sec. 157). This is in accordance with the stated policy of the United States, as set forth in section 1 of the National Labor Rela-

tions Act, to encourage the practice and procedure of collective bargaining and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (ibid., sec. 151). Incidentally, the policy of the State of New York is not to the contrary (see N. Y. Const., Art. I, sec. 17; Waterfront Comm'n Act, Art. XV, par. 1 [Laws of 1953, chap. 882, sec. 1]).

The underlying authority for a contention of this nature is the supremacy clause of the Federal Constitution (U. S. Const., Art. VI). The principle has been applied not only against state laws which are directly contrary to federal legislation, but also to state laws in a field which has been pre-empted by authorized federal legislation (see Weber *v.* Anheuser-Busch, 348 U. S. 468, 474-476). However, before it can be said that a given field has been pre-empted by federal legislation, it must be found that " 'the intention of Congress to exclude States from exercising their police power must be clearly manifested' " (Auto Workers *v.* Wisconsin Board, 336 U. S. 245, 253).

In the field of labor relations there has not been a pre-emption as to all activities. "Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce clause" (Weber *v.* Anheuser-Busch, supra, p. 480). There has been a pre-emption as to some areas of activity in the labor field, but those areas "are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action," but there is a difficult "penumbral area" which "can be rendered progressively clear only by the course of litigation" (Weber *v.* Anheuser-Busch, supra, 480-481).

In the instant case the question as to pre-emption would not be whether Congress intended to exclude the state from directly dealing with the subject of the right to choose bargaining agents or union officials, but whether the Con-

gress intended to go even further and to exclude the state from indirectly limiting the right of choice so that the selection would be only from among those who had not been convicted of a felony.

In our opinion there has not been such a pre-emption and, further, there is no conflict between the provisions of section 8 of the Waterfront Commission Act and section 7. of the National Labor Relations Act. We do not believe that the Congress intended to interfere with the right of states to deal with their special police problems with respect to the waterfront and to deal with them in the limited manner that the New York Legislature did in section 8. In International Longshoremen's Association, Ind. *v.* Hogan (3 Misc. 2d 893, supra) the same question was directly at issue and the same conclusion was reached. Similar arguments for avoidance of section 8 were made in the second Linehan case (116 F. Supp. 683, supra), in Staten Island Loaders (117 F. Supp. 308, supra), in Bradley (130 F. Supp. 303, supra) and in Hazelton *v.* Murray (21 N. J. 115). The arguments were there rejected.

Hill *v.* Florida (325 U. S. 538) is readily distinguishable. In that case the subject Florida statute required labor unions and their businees agents to be licensed by a certain administrative agency of the state. Although the statute prohibited the issuance of a business agent's license to anyone who had been convicted of a felony, it also contained other prohibitions against issuing such licenses and also certain regulations generally subjecting applicants for a license to the task of satisfying the administrative agency that they were entitled to the licenses according to certain standards. The action was by the Attorney-General of Florida to enjoin a labor union and its business agent from operating on the ground that they had not procured licenses. The Attorney-General did not claim that the business agent had been convicted of a felony. As pointed out in International Longshoremen's Association, Ltd., *v.* Hogan (supra, p. 896) Florida's statute sought "to regulate col-

lective bargaining by licensing persons who wished to act as business agents" and "Florida did not argue that it was confronted with any special police problem other than regulating collective bargaining," while in the instant case the New York State Crime Commission clearly demonstates a need for police power legislation directed not at collective bargaining, but at the protection of union funds.

The remaining question concerns the constitutionality of section 8. Appellants contend (1) that the terms of the section are vague and indefinite in that they may include convictions in another jurisdiction which are deemed by that other jurisdiction to be for felonies, even though the law of that jurisdiction giving criminality to the acts in question would be repugnant to the public policy of our state; (2) that the section is an ex post facto law and a bill of attainder and (3) that the section disqualifies a person from holding union office without benefit of judicial trial or hearing and without affording him an opportunity to show his fitness for the position. An amicus curiae asserts that the section unreasonably interferes with De Veau's right to work, in violation of section 6 of Article I of the State Constitution and of the Fourteenth Amendment of the Federal Constitution.

The constitutionality of the Waterfront Commission Act has previously been upheld in several decisions (Staten Island Loaders *v.* Waterfront Comm'n of N. Y. Harbor, 117 F. Supp. 308, aff'd 347 U. S. 439, supra; Linehan *v.* Waterfront Comm'n of N. Y. Harbor, 116 F. Supp. 683, aff'd 347 U. S. 439, supra; Bradley *v.* Waterfront Comm'n of N. Y. Harbor, 130 F. Supp. 303, supra; O'Rourke *v.* Waterfront Comm'n of N. Y. Harbor, 118 F. Supp. 236, supra; Hazelton *v.* Murray, 21 N. J. 115, supra; International Longshoremen's Ass'n, Ind., *v.* Hogan, 3 Misc. 2d 893, supra). The last two cases just cited dealt specifically with section 8. We perceive no reason for not following the decisions in the cases cited.

Since section 8 is valid and since De Veau's conviction is a conviction within the meaning of that section, the complaint was properly dismissed and judgment on the pleadings in favor of respondent was properly granted. It follows, of course, that the motion for an injunction pendente lite was properly denied. The order should be affirmed.

Appendix C.

Opinion of the Court of Appeals.

GEORGE DE VEAU *et al.*, Individually and as Members of Local 1346 of the International Longshoremen's Association (Ind.), and on Behalf of All Other Members of Local 1346 of the International Longshoremen's Association (Ind.), Appellants, *v.* JOHN M. BRAISTED, JR., as District Attorney of Richmond County, Respondent.

Decided February 26, 1959.

DESMOND, J. Plaintiff De Veau is the elected secretary-treasurer of a local union of longshoremen and plaintiffs Lowery and Honan are members of that union. In this suit for a declaratory judgment and for an injunction plaintiffs make three main assertions. First, they say that section 8 of the Waterfront Commission Act (L. 1953, ch. 882, as amd.) is unconstitutional as being in conflict with section 7 of the National Labor Relations Act (U. S. Code, tit. 29, §157). Second, they urge that section 8 is unconstitutional as interfering with the right of employees to self-organization and collective bargaining. Third, they argue that section 8 in its prohibitions against the collection of union dues on the waterfront by a person convicted of a "felony" should be held not to apply to plaintiff De Veau because his plea of guilty in 1922 to attempted grand larceny, first degree, resulted in a suspended sentence only. The suit is brought against the District Attorney of Richmond County because that officer is, according to the complaint, threatening to prosecute under section 8 De Veau or any other officer of Local 1346, International Longshoremen's Association, who attempts to collect union dues for that organization while plaintiff De Veau continues as an officer or agent thereof.

Special Term dismissed the complaint for insufficiency and ordered judgment for defendant on the pleadings, holding section 8 to be constitutionally valid and holding that

within that statute's meaning plaintiff De Veau, despite the suspension of his sentence, had been "convicted" of a felony. The Appellate Division unanimously affirmed. The constitutional questions permitted plaintiffs to appeal to this court as of right (Civ. Prac. Act, §588, subd. 1, cl. [a]).

The Waterfront Commission Act passed in 1953 (L. 1953, chs. 882, 883) put into statutory form a compact entered into between the States of New York and New Jersey and approved by the United States Congress. New Jersey enacted a substantially similar statute ([N. J.] L. 1953, ch. 202; Rev. Stat. of N. J. [1953-1954 Cum. Supp.], tit. 32, subtit. 11). Part I of the New York law contains legislative findings and declarations as to a number of bad labor conditions and practices on the Port of New York waterfront. To deal with the evils a bi-State Waterfront Commission was set up with large powers of enforcement. One of the methods adopted by the two States for ridding the waterfront of people considered responsible for the found evils was section 8 of our act (Rev. Stat. of N. J., §32:23-80 is identical), reading in its material part as follows:

> "No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability."

Elsewhere in the act there are other prohibitions or restrictions against employment on certain waterfront jobs of persons convicted of crimes (see Waterfront Commission Act, pt. I, arts. V, VI, VIII, X).

Our first question of law is as to whether this State-enacted law conflicts (see *Weber* v. *Anheuser-Busch*, 348 U. S. 468) with section 7 of the Federal Taft-Hartley Act (U. S. Code, tit. 29, §157) and is thus invalid under the Supremacy Clause (U. S. Const., art. VI, §2). Section 7 of the Federal act reads thus:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

Plaintiffs say that section 7 of the Federal law is so complete a pre-emption of the particular field that no room is left for any State action which, like section 8 of the New York act, puts limits on the right of employees engaged like plaintiffs in interstate commerce to "bargain collectively through representatives of their own choosing". The ready answer is that Congress has not by any language in section 7 "clearly manifested" or manifested at all an "intention to exclude States from exercising their police power" (see *Auto Workers* v. *Wisconsin Bd.*, 336 U. S. 245, 253). Any doubt as to this seems to have been removed by *Hotel Employees* v. *Sax Enterprises* (358 U. S. 270). The New York Legislature acted on information in the report submitted to it in 1953 by the New York State Crime Commission (see N. Y. Legis. Doc., 1953, No. 70) and in a number of other official reports and surveys as to the

connection between unsavory waterfront conditions and the records of some officers as to waterfront crimes (see Justice BRENNAN's description in *Hazelton* v. *Murray*, 21 N. J. 115, 120-123). And, of course, besides the legislative findings there is a presumption of adequate inquiry and determination by the Legislature of the weight and significance of all the material presented to it (see *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). New York State, therefore, to deal with existing crime and disorder exercised its police power in a not unusual way by barring from certain occupations persons with criminal court records (see, as other examples of such legislation, Education Law, §§6502, 6613, subd. 12; §6911, subd. 1, par. e; §7011, subd. 1, par. a; §7108, subd. 1; §7210, subd. 1, par. e; §7308, subd. 1, par. e; §7406, subd. 1, cl. [c]; and see *Matter of Barsky* v. *Board of Regents*, 305 N. Y. 89, affd. 347 U. S. 442).

This brief examination of the Waterfront Commission Act and its purposes sufficiently rebuts all plaintiffs' charges of unconstitutionality. A considerable list of other decisions, impressive for their unanimity, have upheld this legislation against similar attacks (*Linehan* v. *Waterfront Comm.*, 116 F. Supp. 683; *Staten Is. Loaders* v. *Waterfront Comm.*, 117 F. Supp. 308, both affd. 347 U. S. 439; *Bradley* v. *Waterfront Comm.*, 130 F. Supp. 303; *Matter of Local 824* v. *Waterfront Comm.*, 7 A D 2d 630; *Hazelton* v. *Murray*, 21 N. J. 115, *supra*; *International Longshoremen's Assn.* v. *Hogan*, 3 Misc. 2d 893).

The remaining question is whether plaintiff De Veau was, when he received a suspended sentence on a felony charge many years ago, "convicted" of that felony within the meaning of section 8. The question is one of legislative intent, as we pointed out in *Matter of Weinrib* v. *Beier* (294 N. Y. 628) and *Matter of Richetti* v. *New York State Bd. of Parole* (300 N. Y. 357). In those two instances we found indications that in the two statutes involved (Education Law, §1311. and Correction Law, §242) the Legis-

lature intended the word "conviction" or "convicted" to include a suspended sentence (and see *Matter of Shapiro* and *Matter of Siegel*, 6 A D 2d 866, motion for leave to appeal denied 5 N Y 2d 707, 708). A similar intent is readily discovered as to section 8 of the Waterfront Commission Act. The act, as we have pointed out above, contains separate prohibitions against the licensing or hiring in various waterfront occupations of persons (other than union officials) "convicted" of crimes. These bans against licensing are, however, lifted when the convicted person submits evidence to the commission that his conduct has been good for a period of five years. That five-year period is measured (see Waterfront Commission Act, pt. I, art. V) from the date of "suspension of sentence" when sentence has been suspended. Thus, the Legislature in other parts of the Waterfront Commission Act itself clearly had in mind that some of the persons who fell under its license prohibitions might have been "convicted" in the sense only of having received suspended sentences. We conclude that the legislative purpose was to bar from waterfront union positions all persons with felony records even though never subjected to actual imprisonment or fine.

Our rejection of plaintiff De Veau's complaint is not based on any holding that he has failed to exhaust his "administrative remedies". It is said that he should have applied to the Parole Board for a "certificate of good conduct" (Executive Law, §242) since the section 8 prohibition does not apply to one who after conviction has received such a certificate. But since the granting of such a certificate by the Parole Board would be an act of grace and discretion and not of duty or right, we hold that plaintiff could test the constitutionality of the statute without first applying for such a certificate.

The judgment should be affirmed, without costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.

Appendix D.

Notice of Motion with Affidavit Annexed.

STATE OF NEW YORK,
COURT OF APPEALS.

#318

GEORGE DE VEAU, *et al.*,
Appellants,

v.

JOHN M. BRAISTED, JR., as DISTRICT ATTORNEY OF RICHMOND COUNTY,
Appellee.

Sir:

PLEASE TAKE NOTICE, that upon the affidavit of THOMAS W. GLEASON, sworn to the 30th day of April, 1959, the Undersigned will move this Court on the 11th day of May, 1959, at 2:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, to amend its remittitur in the above action to certify that a question under the Constitution of the United States was presented and necessarily passed upon by the Court of Appeals, viz: whether Section 8 of the Waterfront Commission Act on its face and as applied to the appellant, George DeVeau, deprived him of his right to due process of law under the Fourteenth Amend-

ment of the Constitution of the United States and that said question was decided adversely to the appellants.

Dated: New York, N. Y.
April 29, 1959

Yours, etc.,

THOMAS W. GLEASON,
Attorney for Appellant,
Office & P. O. Address,
80 Broad Street,
New York 4, N. Y.

To:

JOHN M. BRAISTED, JR.,
District Attorney of Richmond County,
Office & P. O. Address,
County Courthouse,
St. George, Staten Island.

Affidavit of Thomas W. Gleason, in Support of Motion.

STATE OF NEW YORK,
COURT OF APPEALS.

#318

GEORGE DE VEAU, *et al.*,
Appellants,

v.

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,
Appellee.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

THOMAS W. GLEASON, being duly sworn, deposes and says:

I am the attorney for the appellants and I make this affidavit in support of a motion to amend the remittitur to certify that the question of due process under the Constitution of the United States was presented, necessarily passed upon by this Court and decided adversely to the appellants.

This appeal was decided February 26th, 1959; the judgment was entered on the 16th day of March, 1959 and the remittitur was filed in the Clerk's office of the County of Richmond on the 16th day of March, 1959.

The purpose of this motion is to preserve appellants' rights to appeal on a question which was apparently decided by this Court but to which no specific reference was made. While the Court in the first paragraph of its opinion clearly indicates that questions under the Federal Constitution were raised, it makes no specific mention of due process.

Affidavit of Thomas W. Gleason.

The issue of due process under the Fourteenth Amendment was raised and decided in the Court below. (Record on Appeal, fols. 192-195). It was raised in this Court by appellants in Point II of their brief; and it was the sole point raised in this Court by the New York Civil Liberties Union as *amicus curiae*. It was vigorously contested by respondent in Point II of his brief.

It would seem that this Court had due process in mind in the last paragraph of its opinion where it held that the remedy afforded by Section 8 of the Waterfront Commission Act is an act of grace and one of discretion rather than a duty or right. Moreover, at paragraph 3 of its unrevised and uncorrected opinion, the Court stated:

> "New York State, therefore, to deal with existing crime and disorder exercised its police power in a not unusual way by barring from certain occupations persons with criminal court records (see, as other examples of such legislation, Education Law, Sections 6502, 6613, subd. 12; Section 6911, subd. 1e; Section 7011, subd. 1a; Section 7108, subd. 1; Section 7210, subd. 1e; Section 7308, subd. 1e; Section 7406, subd. 1e; and see *Matter of Barsky* v. *Board of Regents*, 305, N. Y. 89, affd. 347 U. S. 442."

This too, would clearly seem to be a reference to the due process issue. However, since "due process" is not explicitly mentioned in the opinion, this motion seeks to avoid any possible ambiguity.

WHEREFORE, your affiant prays that the remittitur be amended as aforesaid.

/s/ THOMAS W. GLEASON

Sworn to before me this
30th day of April, 1959.

/s/ JULIUS MILLER

JULIUS MILLER
Notary Public, State of New York
No. 31-2709850
Qualified in New York County
Commission Expires March 30, 1961

Appendix E.

Order Denying Motion.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fourteenth day of May A. D. 1959.

Present,

Hon. ALBERT CONWAY, Chief Judge, presiding.

Mo. No. 277

GEORGE DE VEAU, *et al.*,
Appellants,

vs.

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,
Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied upon the ground that the opinion in this Court shows that upon the appeal federal questions were presented and necessarily passed upon.

A copy

GEARON KIMBALL,
Deputy Clerk.

(SEAL)

2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

THOMAS R. SULLIVAN,
Assistant District Attorney,
Attorney for Appellee,
County Court House,
Staten Island 1, New York.

JOHN M. BRAISTED, JR.,
Of Counsel.

Adrian Press Corp., 63 Beekman Street, N. Y.—Beekman 3-1030-31 10

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 938

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the grounds that it is manifest that the questions on which the decision of this Court depends are so unsubstantial as not to need further argument as hereinafter set forth.

(1) The Waterfront Commission Act has been held not to be in conflict with the National Labor Relations Act as amended.

Since the enactment of the Waterfront Commission Act, appellant, along with others similarly situated, have brought many actions in both the State and Federal Courts

attacking its validity. The question of the pre-emption of this field by the Federal Government through the enactment of the National Labor Relations Act as amended by the Taft-Hartley Act (29 U. S. Code Section 151) has been raised in almost every instance. This question was raised specifically in *Linehan* v. *Waterfront Commission*, 116 Fed. Sup. 683, and *Staten Island Loaders, Inc.* v. *Waterfront Commission*, 117 Fed. Sup. 308. In both of these cases the United States District Court for the Southern District of New York held that the Waterfront Commission Act was not in conflict with the National Labor Relations Act as amended and was a proper exercise of the police powers of the States of New York and New Jersey.

Appeals were taken from these cases to this Court and a motion to affirm these appeals without argument was granted by this Court on April 12th, 1954 in 347 U. S. 439 and a re-hearing on this motion to affirm was denied on June 1st, 1954 in 347 U. S. 994.

Subsequently, further attacks were made upon the Waterfront Commission Act in *Bradley* v. *Waterfront Commission*, 130 Fed. Sup. 393, in which Mr. Justice KAUFMAN noted that the same arguments of supremacy and pre-emption had been made in the application before this Court in the *Linehan* case.

The case of *Hill* v. *Florida*, 325 U. S. 538, is readily distinguishable on its facts from the case at bar. Under the statute in that case, a union and or its representatives would be prevented from engaging in negotiations for failing to obtain a license. Such is not the case under the New York Law as was pointed out by Chief Justice STONE in his concurring opinion in *Hill* v. *Florida*, 325 U. S. 538, 544-545:

> "This, of course, does not mean that labor unions or their officers are immune, in other respects, from

the exercise of the state's police power to punish fraud, violence, or other forms of misconduct, either because of the commerce clause or the National Labor Relations Act. It is familiar ground that the commerce clause does not itself preclude a state from regulating those matters which, not being themselves interstate commerce, nevertheless affect the commerce, California v. Thompson, 313 U. S. 109, 113-114, 116, and cases cited; Parker v. Brown, 317 U. S. 341, 360, and cases cited, and that the state's authority is curtailed only as Congress may by law prescribe in the exercise of the commerce power. United States v. Darby, 312 U. S. 100, 119, and cases cited. I can find nothing in the National Labor Relations Act or its legislative history to suggest a Congressional purpose to withdraw the punishment of fraud or violence or the violation of any state law otherwise valid, from the state's power merely because the state might subject the business agent of a labor union, who violates its law, to imprisonment which would prevent his functioning as a bargaining agent for employees under the National Labor Relations Act, Allen-Bradley Local v. Board, 315 U. S. 740, 748. See S. Rep. No. 573, 74th Cong., 1st Sess; H. Rep. No. 1147, 74th Cong., 1st Sess."

The basic policy of the National Relations Labor Act is to permit the organization of workers and the designation of representatives by them for the purpose of negotiating terms and conditions of employment. This is the essence of the right protected by Section 7 of the Taft-Hartley Act (29 U.S.C. 157). Nothing contained in Section 8 of the Waterfront Commission Act interferes with the right of employees to organize or to negotiate or to choose their own representatives. Concededly, it does place a possible disadvantage if certain representatives are chosen

but these disadvantages do not affect their bargaining powers or their ability to negotiate as was stated by Mr. Justice FRANKFURTER in *San Diego Building Trades Council* v. *Garmon*, —— U. S. ——, 79 S. Ct. 773, 778-779:

> "Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judically necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Ass'n. of Machinists v. Gonzales, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

It should be pointed out that Section 8 of the Waterfront Commission Act was enacted after exhaustive hearings conducted by the New York State Crime Commission showing the deplorable situation existing along the waterfront of the Port of New York as a result of the control exercised by convicted felons over certain waterfront labor unions. This is pointed out by the Court of Appeals in considering this case in its decision at 5 N. Y. 2d 236 and

by Mr. Justice BRENNAN in considering the same statute in *Hazelton* v. *Murray*, 21 N. J. 115, 120-123.

That Congress has not completely pre-empted this field of regulating and controlling the election of convicted felons by labor unions can be seen in the fact that a bill providing similar prohibitions known as the "Labor-Management Reporting and Disclosure Bill of 1958" (S 3974) was introduced in the Senate on June 10th, 1958, and a similar measure known as the "Labor-Management Reporting and Disclosure Bill of 1959" (S 1555) was passed by the Senate on April 25th, 1959.

(2) Section 8 of the Waterfront Commission Act does not violate the Due Process Clause of the Fourteenth Amendment, is not *Ex Post Facto* nor is it a Bill of Attainder.

All of the objections raised by the appellant under this heading are allegedly predicated upon a failure of the appellant to have "his day in Court." This assumption overlooks the basic fact that the appellant had his day in Court when he pled guilty to the original charge before a competent criminal tribunal.

That a State may in the exercise of its police powers regulate standards of qualifications and eligibility for employment has long been recognized by this Court, provided such standards are reasonably related to their fitness for office. Such regulations and limitations are not considered *ex post facto* nor bills of attainder or more clearly bills of pains and penalties.

This doctrine, laid down in *Dent* v. *West Virginia*, 129 U. S. 114 and *Hawker* v. *New York*, 170 U. S. 189, has been reiterated in recent years by this Court.

In *Garner* v. *Los Angeles Board*, 341 U. S. 716, 723, Mr. Justice CLARK speaking for the majority of the Court said:

"Both *Dent* and *Hawker* distinguish the *Cummings* and *Garland* cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary affect of disqualifying some persons presently engaged in it."

The question allegedly presented by the appellant in the jurisdictional statement as to bill of attainder cannot lie since it is obvious that the intention of the legislature of New York in enacting Section 8 of the Waterfront Commission Act was not merely to punish this appellant or others similarly situated, but rather to protect employees of waterfront labor unions from manifest evils and as such is a non-penal exercise of the power of the State. Since the statute is non-penal in so far as the appellant is concerned, there cannot be a bill of attainder as was pointed out in *Trop* v. *Dulles*, 356 U. S. 95-96:

"This Court has been called upon to decide whether or not various statutes were penal ever since 1798. Calder v. Buil, 3 Dall. 386, 1 L. Ed. 648. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence

of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

CONCLUSION

There is no substantial federal question presented by this appeal, jurisdiction should not be noted and the appeal should be dismissed.

June 19, 1959.

Respectfully submitted,

THOMAS R. SULLIVAN,
Assistant District Attorney,
Attorney for Appellee.

JOHN M. BRAISTED,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1958

No. 938 71

GEORGE DE VEAU,

Appellant,

—against—

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT BY NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT AND IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL

NANETTE DEMBITZ
Attorney for The New York Civil Liberties Union

EDWARD L. SADOWSKY, Esq.
of Counsel

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32 CASE PRESS INC., 82 Beekman St., N. Y.—BEekman 3-2003

IN THE

Supreme Court of the United States

October Term, 1958

No. 938

GEORGE DE VEAU,

Appellant,

—against—

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT BY NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT AND IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, appears as *amicus curiae* with the written consent of both parties on file with the Clerk of this court. The Union, a non-profit, non-partisan membership corporation, is organized to encourage and foster the rights and liberties guaranteed by the Constitution and endeavors to vindicate those rights when threatened by unreasonable restrictions imposed by government.

The Union appears here because of its conviction that Section 8 of the Waterfront Commission Act results in just

such an arbitrary invasion of the rights of the appellant and all others affected by it. In the courts below, the Union, along with the appellant, urged that Section 8 resulted in a deprivation of his rights without due process. This issue has been decided adversely to him (Jurisdictional Statement, pp. 38, 43).

The due process question is substantial and important. Section 8 of the Waterfront Commission Act provides, in effect, that no one can act or work as an officer or agent of a labor union covered by the Act if he has ever been convicted of a felony, unless he has been pardoned or received a Certificate of Good Conduct from the Board of Parole. The statute on its face and as here construed and applied, includes any felony no matter how long past or its circumstances, and makes no provision for a hearing as to present fitness. Referring to Executive Law, Section 242, read in conjunction with the Waterfront Commission Act, the Court of Appeals held that an exemption from the disqualification for employment is solely "an act of grace and discretion and not of duty or right" (Jurisdictional Statement, p. 44).*

Pursuant to these provisions appellant has been deprived of his right to work at an elected union office solely on the basis of a conviction, thirty-seven years ago, at the age of nineteen for which he received a suspended sentence. There is no finding on this record that he is presently either unfit for his office or of poor moral character or a threat to honesty or efficiency on the waterfront of the Port of New York.

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* Executive Law Section 242 makes no provision for a hearing and instead provides "The granting of a Certificate of Good Conduct shall be in the sole discretion of the Board."

The right to work at a chosen occupation is protected by the Fourteenth Amendment to the Constitution. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232. Of course, the right may be made subject to reasonable qualifications and restrictions. *Barsky* v. *Board of Regents of N. Y.*, 347 U. S. 442. Under this formula the issue squarely presented is whether a thirty-seven year old felony conviction alone is a reasonable ground for barring appellant from a lawful occupation.

To resolve this issue affirmatively would be contrary to logic and good sense. It would assume that there is an inevitable and an ineluctable connection between appellant's antecedent felony and his present conduct and probity.

The appellant here is given no right to cure his disqualification; he can only resort to "an act of grace and discretion" (Jurisdictional Statement, p. 44) which implicitly may be subject to uncorrectable abuse and caprice. Appellant, therefore, may today be an honest and efficient servant of his union and its members and yet the ancient felony, like some indelible stigmata, bars him from that service. In *Barsky*, this court, referring to a statute which granted a full due process hearing stated: "This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holders." 342 U. S. at p. 452. After reviewing the detailed provisions for notice, hearing, the right to counsel, the right to produce and cross-examine witnesses and to have subpoenas issued on one's behalf, this court held that these provisions were "within the degree of reasonableness required to constitute due process

of law" (at p. 453). Here, under the holding of the Court of Appeals, there is no right to any hearing whatsoever. Thus, the appellant here has no right to have considered "the nature of the offense which he has committed" which this court has said must be taken into account in determining a person's character. *Schware* v. *Board of Bar Examiners, supra,* at p. 243.

The appellee in the courts below, relied heavily on the legislative findings of crime and corruption as a justification of the statute. We have no quarrel with these findings. We urge however, that they have no relevancy to the issue presented here. While the findings might justify the regulation of unions and their officers, they are in no way determinative of whether there is a rational nexus between appellant's felony and his present qualifications. It requires no argument that where restrictive legislation is justified, it must nonetheless bear a reasonable relation to the legislative objective.

Appellant's conviction for a felony at the age of nineteen may be just as irrelevant to his present conduct as prior arrests and Communist party activities were found to be in *Schware* v. *Board of Examiners, supra.* Such a conviction may likewise have as little bearing on good moral character as the refusal to answer questions on the grounds of the Fifth Amendment. *Slochower* v. *Board of Higher Education,* 350 U. S. 551. The statute here in question raises the kind of "conclusive presumption" frowned upon by this court in its *Slochower* decision. Like *Slochower,* the presumption arises regardless of the remoteness of the proscribed conduct and without any further inquiry as to the fitness of the appellant for his union office.

Both *Schware* v. *Board of Bar Examiners* and *Barsky* v. *Board of Regents of N. Y., supra,* adumbrate the substantial question raised here. In both cases the right to work at a chosen occupation was at issue. However, both cases are characterized by a plenary hearing prior to a finding of unfitness.

In *Barsky*, this court, as we have already noted, specifically distinguished and did not decide the issue in this case. Under the statute reviewed in the *Barsky* case, the conviction for a crime served merely as the basis for an investigation into fitness. Surely, there is a significant contrast between that statute and Section 8 of the Waterfront Commission Act which results in an automatic bar to an occupation. The *Barsky* case is further contrasted by the fact that there, at least, the court was concerned with a present conviction, not one buried well in the past.

The *Dent* and *Garner* cases relied on by the appellee are not authorities against appellant and indeed, emphasize the substantiality of the question presented in the instant case. In *Dent* this court referred to the right to "follow any lawful calling, business or profession" and said "the right to continue their prosecution * * * cannot be arbitrarily taken from them * * *" (129 U. S. at p. 121). This court there upheld as reasonable, qualifications for doctors relating to their education and knowledge of medicine. In *Garner*, this court was concerned with the special problem of the loyalty of government employees. Even there, the court affirmed the principle that a disqualification for employment must be reasonable and would offend due process unless individual circumstances were taken into account (341 U. S. at pp. 723-724). In *Hawker* v. *New York*, 170 U. S. 189, the

state had passed a statute making it a crime to practise medicine after conviction for a felony. The sole challenge made by the appellant was that the statute could not be applied to him because it was passed after his felony conviction. Thus, the case was cast in the narrow framework of whether the statute was an *ex post facto* law and the full scope of due process was not in issue. However, to the extent that there are any indications in *Hawker* which would support the instant statute, we urge that they have been repudiated by the more recent decisions of this court in the *Slochower* and *Schware* cases and require reconsideration.

A determination adverse to the appellant in this case would result in a rule far broader than that of *Barsky* v. *Board of Regents, supra*, and for this reason, at least, full argument of the issue presented here, should be required by this court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

NANETTE DEMBITZ
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EDWARD L. SADOWSKY, Esq.
of Counsel

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted]

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR. as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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OCTOBER TERM, 1958

No. 938.

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR. as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

1. Appellee, in his Motion to Dismiss, states that the question of pre-emption has been raised many times. He cites *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683, *Staten Island Loaders, Inc.* v. *Waterfront Commission*, 117 F. Supp. 308, and *Bradley* v. *Waterfront Commission*, 130 F. Supp. 303.

It is to be particularly noted that the validity of Section 8 of the Waterfront Commission Act, the section herein involved, has never been adjudicated by this Court, nor by any other Federal Court. None of the foregoing cases cited by Appellee involved Section 8.

The *Linehan* case, *supra*, involved the validity of Article VIII of the Act requiring the establishment of a longshore-

men's register by the Waterfront Commission and the discretionary authority granted to the Commission by the Act to deny inclusion in such register for certain enumerated reasons. This case also involved the validity of Article IX of the Act which set up a system of regularity of employment on the waterfront eliminating certain irregular waterfront employees.

The *Staten Island Loaders, Inc.* case, *supra,* involves Article VII of the Act which prohibited the continuance of public loading on the waterfront in the Port of New York.

The *Bradley* case, *supra,* was an attempt to enjoin the Waterfront Commission from enforcing Article IX, *supra,* and Article XII which provided for the establishment of employment information centers within the Port of New York and for the hiring of longshoremen and port watchmen through such employment information centers. As previously stated, none of the foregoing cases involves the question of pre-emption raised here. The instant case involves only that section of the Act which prevents employees from bargaining through representatives of their own choosing. There is no question that this right of employees to bargain through representatives of their own choosing is one of the primary objectives of the National Labor Relations Act, as amended by the Taft-Hartley Act, and any limitation by a state on such right is a substantial question for this Court.

Appellee, on pages 3 and 4 of the Motion to Dismiss concedes that employees are placed at a disadvantage by Section 8 of the Waterfront Commission Act if certain representatives are chosen and he further states that these disadvantages do not effect their bargaining powers or their ability to negotiate. These statements are clearly contradictory. Employees negotiate through their chosen

representatives and any disadvantage in their choice effects their ability to negotiate. Appellee cites *San Diego Bldg. Trades Council* v. *Garmon*—U. S.—79 S. Ct. 773, as authority for the foregoing opinion. The significance of the quotation by Mr. Justice Frankfurter cited by Appellee is not readily apparent except as a statement that the several States have the power to regulate an activity where such activity is merely a peripheral concern of the National Labor Relations Act. Section 7, granting employees the right to bargain collectively through representatives of their own choosing, can, in no way, be deemed a merely peripheral concern of the National Labor Relations Act. *It is the heart of the Act.*

The one case cited by Appellee which involves the validity of Section 8, as herein, is *Hazelton* v. *Murray*, 21 N. J. 115, which was never before this Court. The opinion written by Mr. Justice Brennan, now of this Court, does not include any mention of the case of *Hill* v. *Florida*, 325 U. S. 538, which should be controlling in this case. Appellee cites the concurring opinion of Chief Justice Stone to distinguish that case from the case at bar. That portion of the concurring opinion cited by Appellee points out that a State may punish a union officer or a union for misconduct or criminal activity and such punishment would not violate the National Labor Relations Act. We concur in this view. However, this is not the situation herein involved. Here, the union officer is not accused or tried for any misconduct or crime but is merely barred for the commission of a felony no matter how remote or unrelated to his activities as a union officer.

The decision in the *Hazelton* case, *supra*, found Section 8 to be a valid exercise of the police power of the states, as did the Court of Appeals of New York in the instant case.

The brief of respondent State of Florida in the *Hill* case contained the following statement at page 5 under the heading of "Argument":

> "Similar regulations are imposed on attorneys, physicians, barbers, insurance agents, real estate brokers, nurses, beauty parlor operators, civil engineers, architects, liquor dealers, and many others engaged in gainful occupations. All such requirements have been upheld in the interest of the public health, morals, safety, welfare and prosperity of the people. *They are imposed on the theory that the business engaged in by applicant vitally affects the public welfare and that the public is entitled to the protection they afford* • • • Labor unions, like other trade, professional and business organizations, are concerned with the business of making a living. They do not bother themselves with the things that concern religious bodies, chambers of commerce and like institutions. It is on this basis we say they are subject to police power • • • The point is that labor organizations so vitally affect the public that they may be regulated in like manner as other organizations likewise engaged and their business agents may be subject to like regulation as insurance agents, real estate brokers, and others engaged in occupations that effect the public." (Emphasis supplied)

The foregoing was the basis of Appellee's argument in the *Hill* case, with a strong plea for upholding the police power of the state. It is readily apparent therefore that in *Hill* v. *Florida, Hazelton* v. *Murray* and the instant case, the state courts based the upholding of the statutes on the police power.

Appellee points out that Section 8 was enacted after exhaustive hearings. This Court, in declaring the Florida statute invalid must, according to Constitutional inter-

pretation of legislative enactments, have found the existence of those facts that could have validated that statute, *and despite these findings, still declared the statute unconstitutional.*

> "On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as equivalent of such finding.
>
> 11 Am. Jur. Constitutional Law Sect. 142 at p. 820.
>
> "Facts:—If an act of the legislature would be valid only in the event certain circumstances exist, it will be presumed that all such circumstances do exist."
>
> 11 Am. Jur. Constitutional Law Sect. 131 at p. 794.

2. Appellee cites *Trop* v. *Dulles*, 356 U. S. 95, 96 for the authority that the statute herein involved is non-penal in nature and therefore cannot be a bill of attainder. The portion of the opinion cited by Appellee contains the following by Mr. Chief Justice Warren:

> "In deciding whether or not a law is penal, this Court has *generally* based its determination upon the purpose of the statute.[18]" (Emphasis supplied.)

As expressed by Mr. Chief Justice Warren, the above is a general proposition and is not to be applied universally. Footnote 18 which is to be read in conjunction with the above statement, reads as follows:

> "Of course, the severity of the disability imposed as well as all the circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 608-610; 64 Yale L. J. 712, 722-724."

In the Vanderbilt Law Review, *supra,* at Page 608, ¶2, we find the following language by Mr. Wormuth:

> "Justice Field was right in saying that the imposition of a disability on a principle of discrimination which is irrelevant to the proscribed activity discloses a penal intent. Justice Frankfurter was right in saying that a measure avowedly intended to penalize past conduct discloses a penal intent . . ."

In ¶3, Mr. Wormuth continues as follows:

> ". . . The bill of attainder clause forbade a process as well as an outcome. In many cases the outcome would not be a penalty without the use of the prohibited process. Administrative discharge of subversive employees is not a penalty, but legislative discharge is penal. By appropriate judicial proceedings an attorney may be disbarred, and this is not penal, although direct legislative proscription, as in *ex parte* Garland, is penal. It appears that there are certain results which the legislature is forbidden to achieve directly; the legislative decision is a bill of attainder."

The following paragraph by Mr. Wormuth at page 610, clearly shows that the general rule set forth by Mr. Chief Justice Warren in *Trop* v. *Dulles,* is not applicable here, and that there is a substantial question as to whether Section 8 is a bill of attainder and *ex post facto* legislation:

> "There are of course, cases in which character is evaluated in administrative and judicial proceed-

> ings and the outcome is not a penalty—in licensing and in awarding the custody of children, for example. In such proceedings the issue ordinarily cannot be raised by the tribunal which judges (although in revocation of licenses it may be); the test applied has already been established by a general law; the hearing observes appropriate procedural safeguards. In legislative disqualification, on the other hand, the legislature takes the initiative in raising the question; it enacts the standard which it applies; and it proceeds, as Story pointed out, "without any of the common forms . . . of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. *Acting in this manner discloses a penal intent*" (emphasis supplied).

In the instant case, the statute automatically bars the appellant from serving as a union officer for a felony committed more than thirty years prior to its enactment. appellee, at Page 5 of his Motion to Dismiss, states,

> "That a state may in the exercise of its police power regulate standards of qualifications and eligibility for employment has long been recognized by this Court, *provided such standards are reasonably related to their fitness for office*". (Emphasis supplied.)

Assuming, arguendo, that a state may set standards and qualifications for labor union officials, there is nothing to indicate that the intent of Section 8 is to set up such standards and qualifications. As shown in appellant's Jurisdictional Statement, by appellee's own statement, a man may be of the basest moral character and barred from all licensed occupations and still be a labor union official, not subject to the bar of Section 8. In the case of *Dent* v. *West Virginia*, 129 U. S. 121, cited by appellee, Mr. Justice

Field, in discussing the background and meaning of the due process clause, made the following statement at p. 124:

> "In this country, the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property."

This statement exemplifies the substantiality of the question of due process raised herein. Section 8 bars appellant without any provision for hearing or trial of any kind; it sets up no standards or qualifications reasonably related to his fitness for office; and adds an additional penalty to a felony for which he has long since paid his debt to society.

Conclusion.

The motion to dismiss should be denied and probable jurisdiction noted.

Respectfully submitted,

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Attorney for Appellant.

JULIUS MILLER,
Of Counsel.

Supreme Court of the United States

October Term, 1959

No. 71

GEORGE DE VEAU,
Appellant,

against

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,
Appellee.

On Appeal From the Court of Appeals of the State of New York

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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On Appeal From the Court of Appeals of the State of New York

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The New York Civil Liberties Union, an affiliate of the American Civil Liberties Union, appears here with the written consent of both parties, on file with the Clerk of this Court. The sole objective of the *amicus* organization is to help preserve the liberty of the individual through guarding the rights guaranteed him in the Constitution. The Union is concerned with the instant case because it presents an important issue as to the arbitrary exercise of Government power against the individual. The State of New York has, we believe, deprived appellant of his position and employment as a labor union official on a wholly arbitrary basis, and it has, in consequence of thus disqualifying appellant from his employment, also interfered without reasonable justification with the right of the members of the labor union to freedom of choice in their selection of a spokesman and representative.

This brief will deal solely with the issue of whether New York has acted arbitrarily and in violation of the due process guarantee of the Fourteenth Amendment in barring appellant from his position.

ARGUMENT

New York has disqualified appellant from his employment as a labor union official arbitrarily and in violation of the due process guarantee of the Fourteenth Amendment.

A. The Basis of Appellant's Disqualification

Appellant was discharged from the employment he had held for some years as Secretary-Treasurer of a labor union, pursuant to Section 8 of the New York State Waterfront Commission Act (R. 7-10, 14-15). By Section 8 the State of New York precludes anyone who has ever been convicted of a felony from serving as an officer or agent of a union functioning on the New York waterfront, unless he has been pardoned "or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability." (Laws of New York for 1953, c. 882, Sec. 8; McKinney's Unconsolidated Laws, Section 6700-ww.)[1] However, as the New

[1] The section penalizes the collection of dues for a union which has an officer of the prohibited class. Appellant was discharged from his position as union Secretary-Treasurer because of the threat of enforcement of the criminal penalty against dues-collectors for the union, in the event he remained an officer (R. 7, 9, 21, 22, 48).

The Waterfront Commission Act (McKinney's Unconsolidated Laws, Sections 6700-aa to 6700-zz) deals with disqualification on the basis of past criminal convictions in a series of sections relating respectively to stevedores, longshoremen, and other categories of waterfront employees. However, all the provisions with the exception of that here in issue respecting union officials, which appears in a different part of the statute from the others, accord hearings by the Waterfront Commission on the employee's qualifications (see Section 6700-kk).

York Court of Appeals held, "the granting of such a certificate by the Parole Board would be an act of grace and discretion and not of duty or right" (R. 51).

The Court of Appeals' ruling was based on the provision of the New York Executive Law, that "The granting of a Certificate of Good Conduct shall be in the sole discretion of the Board." (Executive Law, § 242, derived from Executive Law of 1909, c. 23, sec. 116). There is no provision in the Executive Law or in the regulations governing the issuance of certificates, for a hearing, representation by counsel, or indeed any type of appearance before the Board by the applicant for a certificate of good conduct, or even for his submission of data to the Board. The Board either rejects the application out-of-hand, or makes its determination on the basis of a field investigation of whatever scope or type it pleases.[2]

Appellant, who had incurred one felony conviction, had not applied for a certificate of good conduct. However, because grant of the certificate is purely an act of grace, the Court below did not view appellant's failure to apply for it as material (see R. 51). Since an individual has no *right* to relief from the disqualification, the effect of Section 8 is to deprive an individual who has ever been convicted of any felony of his right to continue in his position and occupation. The Court below therefore viewed Section 8 as tantamount to the imposition of an absolute disqualification from employment on the basis of a felony conviction, upheld the statute as such (R. 50), and ruled that appellant was

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[2] See regulations of Board of Parole and communications from Division of Parole in Appendix to this Brief, pp. 12-14. These documents were similarly presented to the New York Court of Appeals by *amicus*.

The possibility of a pardon, which is mentioned in Section 8 of the Waterfront Commission Act, was not argued to or discussed by the Court of Appeals because the practice is that the Governor does not "* * * consider an application for a pardon if the grant of a certificate of good conduct would provide a remedy." See letter from Division of Parole, Appendix, p. 14. See also Regulations, Appendix, p. 11.

barred from his employment by reason of his conviction (R. 51).

Appellant incurred the felony conviction, which resulted in his disqualification from his employment under Section 8 of the Waterfront Commission Act, thirty-five years earlier when he was a youth of nineteen. At that time he and a companion took a car valued at $700, for the purpose of a "joyride" and were apprehended a few hours later by the police; appellant was convicted of attempted grand larceny and was given a suspended sentence (R. 13-14, 21-22, 48). This 35-year old conviction was the sole basis for appellant's disqualification.

We shall first show that appellant's disqualification on the ground of his felony conviction was arbitrary, and that the statute as here interpreted and applied violates due process. Then, though unnecessary in view of the Court of Appeals' interpretation of the statute, we shall, for the sake of refuting possible arguments by the appellee, show that the statute likewise violates due process if it is viewed as establishing, instead of an absolute disqualification, a presumption of disqualification rebuttable through application for a certificate of good conduct.

B. Disqualification by Reason of Felony Conviction

Appellant's case demonstrates the arbitrariness of New York's disqualification for employment as a union official of anyone who has *ever* been convicted of *any* felony under *any* circumstances. Appellant has been barred from his employment on the basis of an ancient conviction which he incurred in his youth before he even reached his majority. The fact that he received a suspended sentence indicates that even at the time of his commission of the act, in 1920, it was recognized that he was likely to be law-abiding thereafter and unlikely to engage in further crminal conduct. Another relevant circumstance is that his offense was unconnected with the waterfront—indeed, it preceded his em-

ployment there (R. 14). Thus, there is no record whatsoever here of "waterfront crimes," the existence of which was urged as justification for the Waterfront Commission Act (see Court of Appeals' opinion, R. 50).

New York has not provided for or made any determination that appellant is in any way unfit for his employment or dishonest or lacking in good moral character. Instead, it treats the ancient felony like an indelible stigma to bar appellant from his employment. New York's blanket provision for disqualification on the basis of a felony conviction denies the possibility of rehabilitation of any person ever convicted of a felony regardless of circumstances. The fact that 35 years have passed without a recurrence in this case, in itself demonstrates the fallacy of the assumption, without resort to other learning on the subject.

In short, appellant's one long-ago conviction cannot with reason be viewed as a demonstration of present unfitness.

This Court has already indicated that an individual cannot, under due process, be disqualified from his calling because he has incurred a felony conviction, without a consideration of the circumstances and nature of the conviction. In *Barsky* v. *Board of Regents*, 347 U. S. 442, where this Court was considering a New York statute regulating the practice of medicine, the opinion indicates that a conviction should not be used to bar an individual from his employment except upon a determination of "whether the convictions, if any, were of such a date and nature as to justify denial of admission to practice in the light of all the material circumstances * * *" 347 U. S. at p. 451. And see page 452. To a similar effect, see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 243, where this Court stated, in reference to disqualification from a profession on the basis of a criminal conviction: "In determining whether a person's character is good the nature of the offense which he has committed must be taken into

account." This Court emphasized, when condemning a blanket disqualification for employment on the basis of past associations without a consideration of their circumstances: "Indiscriminate classification • • • must fall as an assertion of arbitrary power." *Wieman* v. *Updegraff*, 344 U. S. 183, 191. See, similarly, *Slochower* v. *Board of Education*, 350 U. S. 551, 558-559.

These opinions express the fundamental principle that the right to work at the occupation of one's choice is a basic liberty protected by the due process clause, and that the State can restrict this liberty only with and for reason. *Truax* v. *Raich*, 239 U. S. 33, 41; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238; *Greene* v. *McElroy*, 360 U. S. 474, 495. Reasonableness is likewise required in any restrictions imposed on the freedom of members of the union to select whomever they wish as their representatives. Government interference with their freedom of choice as to their leaders, officers, or spokesmen restricts their exercise of the freedom of expression and association guaranteed by the First and Fourteenth Amendments. See *American Communications Association* v. *Douds*, 339 U. S. 382, 389; cf. *Thomas* v. *Collins*, 325 U. S. 516, 530-531; *DeJonge* v. *Oregon*, 299 U. S. 353, 364.

Assuming *arguendo* that waterfront conditions justified some regulation as to union officials, the blanket provision of Section 8 is an unconstitutional method of control, interfering arbitrarily with appellant's right to free choice in his occupation and the right of union members to free choice of their representatives.

The cases cited by appellee in his memorandum in support of his motion to dismiss this appeal are not precedents for New York's action against appellant. In *Dent* v. *West Virginia*, 129 U. S. 114, this Court held that qualifications for doctors relating to their education and knowledge of medicine were reasonable; in doing so, it recognized that "the right to continue • • • (in their profession) cannot

be arbitrarily taken from them * * * " (129 U. S. at p. 121). In *Garner* v. *Los Angeles Board*, 341 U. S. 716, this Court was concerned with the special problem of the loyalty of government employees. Even there, the Court affirmed the principle that a disqualification for employment must be reasonable and would offend due process unless individual circumstances were taken into account (341 U. S. at pp. 723-724). In *Hawker* v. *New York*, 170 U. S. 189, a state statute then in force, superseded by the *Barsky* statute, made it a crime to practice medicine after conviction for a felony. The sole challenge made by the appellant was that the statute could not be applied to him because it was passed after his felony conviction. Thus, the case was cast in the narrow framework of whether the statute was an *ex post facto* law and the full scope of due process was not in issue. However, to the extent that there are any indications in *Hawker* which would support the instant statute, we urge that they have been repudiated by the more recent decisions of this Court.

C. Felony Conviction as Basis for Presumption

On the same score of unreasonableness, the statute would violate due process even if it were suppositiously viewed, contrary to the Court of Appeal's interpretation, as creating a rebuttable presumption that appellant is disqualified from his position and employment, rather than an absolute barrier. For the State to establish a presumption and to act, absent sufficient contradictory evidence, as if the presumed fact were established, is wholly arbitrary unless the presumption is based on probability. *Bailey* v. *Alabama*, 219 U. S. 219, 234; *Western and A. R. Co.* v. *Henderson*, 279 U. S. 639, 642. There must be "a rational connection between what is proved and what is to be inferred" (*Henderson*, 279 U. S. at p. 642); a presumption should be supported by the " 'generality of experience' " (*Adler* v. *Board of Education*, 342 U. S. 485, 496).

Here, unlike the presumption of disqualification in *Adler*, probability and experience contradict, rather than support, the presumption. It cannot be assumed that *anyone* who *ever* committed *any* felony will engage in criminal conduct; or, as applied to appellant, that an individual who committed one felony in his youth 35 years before, which was moreover unconnected with the waterfront and on which sentence was suspended, will commit waterfront crimes. Absent a basis in probability for assuming present criminality on appellant's part, it would be unjustified and unfair to shift the burden of proof to him—to place on appellant the difficult burden of proving the intangible and negative proposition that he is not now lacking in good moral character.[3] Thus, for the State to rely on a presumption of unfitness against appellant or any individual, on the bare basis that he has ever had a felony conviction, would be arbitrary and a violation of due process.

Finally, the statute indisputably violates due process because, even assuming *arguendo* the validity of a presumption based on any past conviction, the individual must be afforded a "fair opportunity" to rebut it. *Western and A. R. Co.* v. *Henderson*, 279 U. S. 639, 642.

> "Where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey* v. *Alabama*, 219 U. S. 219, 238.

Here the method provided by the statute for overcoming the presumption and curing the disqualification is resort to "an act of grace and discretion" (Opinion of Court below, R. 51), which implicitly is subject to uncorrectable abuse and

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[3] See *Bailey* v. *Alabama*, 219 U. S. 219, 236; *Speiser* v. *Randall*, 357 U. S. 513, 526.

caprice. The Board of Parole either rejects an application for a certificate of good conduct out-of-hand, or determines whether to grant it on the basis of an *ex parte* investigation (see *supra*, p. 3). Certainly the Board of Parole procedure does not satisfy due process; there is no "doubt that notice and hearing are prerequisite to due process in civil proceedings" as well as criminal.[4] When the state disqualifies a person from his employment, the evidence "must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy*, 360 U. S. 474, 496. See also *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117, 123.

The instant case is to be contrasted with *Barsky* v. *Board of Regents*, 347 U. S. 442. There this Court dealt with a statute providing that upon a doctor's conviction for crime his license "may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions or procedures of this article upon decision after due hearing." The appellant there "was given an extended hearing" before a committee, and after it had made findings, "a further hearing at which appellant appeared in person and by counsel" before a reviewing body (347 U. S. at p. 446). After considering the detailed provisions for notice, the right to counsel, the right to examine the evidence, to produce and cross-examine witnesses and to have subpoenas issued, this Court held that the procedure for revocation of a license was "within the degree of reasonableness required to constitute due process of law" (at p. 453). As to the "opportunity for a fair hearing," see also page 451. Compare *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 243.

The procedure prescribed by the instant statute was devised for the exercise of a mere act of grace and not as a procedure under which a person's right to continue in his

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[4] *Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 164 (Frankfurter, J., concurring).

occupation would be determined. Such an abrogation of the right to a hearing, by which the innocent may be distinguished from the guilty, can only be tolerated in a time of such crisis that there is no time to consider individual rights. See *Hirabayashi* v. *United States*, 320 U. S. 81, 99, 107, 112-113.[5]

Conclusion

For the foregoing reasons, the judgment must be reversed and the case remanded with directions that Section 8 of the Waterfront Commission Act, on its face and as here applied, is unconstitutional under the due process clause of the Fourteenth Amendment.

Respectfully submitted,

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of Counsel.

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[5] It should be noted that since the argument of the instant case in the New York Court of Appeals, the Federal Labor-Management Reform Act (Public Law 86-267, 86th Congress, S. 1555, enacted Sept. 14, 1959), has gone into effect. Section 504 provides for disqualification from work as a union officer on the basis of a past criminal conviction. However, this section provides that an individual should be disqualified only on the basis of specified crimes and only within five years of his conviction or imprisonment, and furthermore that even within the five years the United States Board of Parole may after hearing hold that he is qualified. The indiscriminate sweep of the New York provision is highlighted by comparison with the Federal act. It also appears that with the enactment of Section 504, there is a clear conflict between New York and Federal law.

APPENDIX

STATE OF NEW YORK — DIVISION OF PAROLE

EXECUTIVE DEPARTMENT

REGULATIONS GOVERNING THE ISSUANCE OF CERTIFICATES OF GOOD CONDUCT BY THE PAROLE BOARD

The Board of Parole may issue, to individuals who have been convicted of crime, certificates of good conduct (a) for the purpose of removing a legal disability incurred through conviction, or (b) for the purpose of furnishing evidence of good moral character, where required by law, or (c) upon proof of the individual's performance of outstanding public service or upon unusual and compelling evidence of his rehabilitation.

However, the certificate may be granted to end a legal disability only if it is provided by law that the certificate will remove the disability in question.

The individual is not eligible for a certificate until a period of five years has elapsed following unrevoked release from custody, suspension of sentence or payment of fine. If the individual has been convicted under the laws of another state or jurisdiction, he will not become eligible for a certificate of good conduct until he has established five years' residence in the State of New York.

• • •

The law granting authority to the Board of Parole to issue certificates of good conduct does not in any way limit or affect the manner of applying for pardons to the Governor. A certificate of good conduct is not a pardon and should not be construed as such. The Board is informed, however, that under ordinary circumstances, the Governor will not consider applications for pardons in cases in which a certificate of good conduct would have the same legal effect.

• • •

Application for a certificate of good conduct shall be made by the individual or his duly authorized representative.

Papers filed in connection with an application will not be returned to the applicant nor will copies be furnished.

All application forms and official records relating to each case will be reviewed by the Board of Parole and a decision made as to whether the petition is to be entertained. The applicant will be notified of the decision. If it is favorable, the Division of Parole will then proceed with an investigation of the case. When the final report of investigation is available, the case will be carefully studied by the Board of Parole and a final determination will be made whether or not a certificate of good conduct shall be granted.

• • •

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF PAROLE

January 3, 1958.

Edward L. Sadowsky, Esq.
Gettner, Simon & Asher
285 Madison Avenue
New York 17, New York

Dear Sir:

This is in response to your letter of January 2, 1958.

Forms of application for a certificate of good conduct and a statement of applicable regulations are enclosed. Please observe that the application must be submitted in duplicate.

The applications are investigated by field investigators of this Division. During the course of the investigation, all pertinent sources, including the applicants, are contacted. No provision is made for appearance by applicants or attorneys before the Board. However, should you deem it necessary in your client's case, arrangements would be made for you to be interviewed by the investigator, at which time you could furnish data for inclusion in his report.

Very truly yours,

/s/ LEE B. MAILLER
Lee B. Mailler
Chairman

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF PAROLE

January 21, 1958.

Edward L. Sadowsky, Esq.
Gettner, Simon & Asher
285 Madison Avenue
New York 17, New York

My dear Mr. Sadowsky:

Your letter of January 6, addressed to the Office of the Governor, has been referred to the Executive Clemency Bureau.

I am furnishing herewith forms of application for a pardon and also for a certificate of good conduct, with rules and regulations applicable to both. Please note that the Governor may not be expected to consider an application for a pardon if the grant of a certificate of good conduct would provide a remedy.

No provision is made for the appearance of counsel in either case. The applications are investigated by an investigator of this Division. The investigation is comprehensive and, should you desire, the investigator will arrange to contact you so that you may present pertinent data for inclusion in the investigator's report.

If you require further information, please do not hesitate to communicate with me.

Very truly yours,

/s/ THORNTON F. BLAAUBOER
Thornton F. Blaauboer
Executive Clemency Bureau

6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLEE'S MOTION TO DISMISS APPEAL

THOMAS R. SULLIVAN,
Assistant District Attorney,
Attorney for Appellee,
County Courthouse,
St. George, Staten Island,
New York.

JOHN M. BRAISTED, JR.,
District Attorney of
Richmond County,
Of Counsel.

Adams Press Corp., 88 Beekman Street, N. Y.—Beekman 3-1050-51 110

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On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the grounds that it now appears that there is no longer any controversy between the parties to this action and that the questions presented insofar as these parties are concerned has become moot. This action was originally commenced by the appellant, George De Veau, herein, and two others, individually and as members of Local 1346 of the International Longshoremens Association (Ind.) and on behalf of all other members of Local 1346 of the Inter-

national Longshoremens Association (Ind.) for a declaratory judgment, and for an injunction, to enjoin the appellee, District Attorney of Richmond County, from enforcing Section 8 of the Waterfront Commission Act of the State of New York (Laws of 1953, Chapter 882, as amended, McKinney's Unconsolidated Laws, Section 6700-ww).

(a) The Material Facts of the Case Prior to the Institution of the Action.

On February 27th, 1922, appellant pleaded guilty in the Court of General Sessions in the County of New York, to the crime of Attempted Grand Larceny 1st Degree, a felony under the laws of the State of New York. For some time prior to January 17th, 1957, this appellant was Secretary-Treasurer of Local 1346, I.L.A. (Ind.), a local labor union of waterfront checkers.

On December 21, 1956, an Assistant District Attorney of Richmond County, an assistant of the appellee, informed William V. Bradley, President of the International Longshoremens Association (Ind.), of the fact that appellant De Veau had a previous conviction for a felony and of the provisions of Section 8 of the Waterfront Commission Act. On or about January 18th, 1957, appellant received a letter from William V. Bradley, President of the International Longshoremens Association (Ind.), suspending him from the office of Secretary-Treasurer of Local 1346 I.L.A. (Ind.). On February 4th, 1957 an action was commenced for a declaratory judgment declaring Section 8 null and void and to enjoin the District Attorney of Richmond County from enforcing the provisions of Section 8. No prosecution had been commenced by the District Attorney of Richmond County for any violation of Section 8 of the Waterfront Commission Act up to the time of the inception of this action, nor has any such prosecution been instituted to the present date.

(b) The Material Facts Arising After the Institution of This Action.

Local 1346 I.L.A. (Ind.) was a labor union of waterfront checkers and had jurisdiction in Staten Island, Richmond County, New York. Subsequent to the inception of this action, and some time in the summer of 1957, the International Longshoremens Association (Ind.) issued a new charter for a new local union of checkers, to be known as Local 1 with jurisdiction over all checkers in the Port of New York including those formerly under the jurisdiction of Local 1346. With the granting of this new charter, Local 1346 ceased to exist as a valid, bonafide labor union and no longer received dues from members in Richmond County. A copy of said charter is annexed hereto as Appendix A.

(c) In View of the Intervening Facts There Is No Longer a Justiciable Controversy Between the Parties.

Section 8 of the Waterfront Commission Act of the State of New York (Laws of 1953, Chapter 882, McKinney's Unconsolidated Laws, Section 6700-ww), the enforcement of which was sought to be enjoined herein, reads as follows:

> "No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within this state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a Court of the United States, or any state or territory therein, of a felony unless he has been subsequently pardoned therefor by the Governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has re-

ceived a certificate of good conduct from the Board of Parole pursuant to the provisions of the executive law to remove the disability."

It is conceded from all of the facts that no prosecution was commenced by the appellee prior to January 18th, 1957. It is also obvious that no prosecution could have been commenced after that date since De Veau had been suspended as a local officer of 1346. It would also seem apparent that the removal of that suspension by the appropriate authorities of the International Longshoremens Association, would not incur any threat of any future prosecutions since the position from which appellant De Veau was suspended has become non-existent.

It appears therefore that there is no effectual relief which can be granted to the appellant herein by any decision of this Court. No action by this Court can restore him to office in a no longer existent labor union. Nor is the appellant in any danger of future prosecution for violation of this section because of his position in Local 1346, for the obvious reason that the local no longer exists. The only matter that could be resolved by this Court acting upon this case at the present time would be to guide the appellant in whether or not he could be an officer in some other waterfront labor union at some future time.

The well settled rule of this Court was established many years ago in *California* v. *San Pablo & Taulare Railroad*, 149 U. S. 308, 314 (1892):

> "The duty of this Court, as of every judicial tribunal is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When in determining such rights, it becomes necessary to give any opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the Court is not empowered

> to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

The right of this Court to inquire into such matters has also been well established. In *Gulf, Colorado & Santa Fe Railways Co.* v. *Dennis*, 224 U. S. 503, 508 (1912), the Court said:

> "We conclude that in the exercise of our appellate jurisdiction over the Courts of the several States we are not absolutely confined to the consideration and decision of the federal questions presented, but as a necessary incident of that jurisdiction are authorized to inquire whether by some intervening event those questions had ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event."

The rule of this Court enunciated many years ago in *Mills* v. *Green*, 159 U. S. 651, 653 (1895) would seem to apply most clearly to the instant case:

> "The duty of this Court, as of every other judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower Court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

A very similar case was decided by this Court over sixty (60) years ago wherein certain facts which occurred between the time of the disposition by the Court of original jurisdiction, the Surrogate's Court of Kings County and the appeals to the Appellate Courts of the State of New York, was raised for the first time in a motion to dismiss an appeal from this Court. *Kimball* v. *Kimball*, 174 U. S. 158 (1898). Objection was made to raising the issue for the first time before this Court. This argument was disposed of by Mr. Justice GRAY at page 163:

> "The objection of laches is of no weight. No consent of parties can authorize this Court to exercise jurisdiction over a case in which it is powerless to grant relief. (Citing cases.) * * * The neglect of both parties to bring that fact to the notice of those Courts affords no reason for this Court's assuming to decide a question the decision of which cannot affect the relief to be ultimately granted in this case."

There is no danger that a dismissal of this appeal will place this appellant in any jeopardy of prosecution for any violation of Section 8 of the Waterfront Commission Act committed prior to his suspension on January 18th, 1957. A violation of Section 8 of the Waterfront Commission Act would be a misdemeanor and under the laws of the State of New York (Code of Criminal Procedure, Section 142) a prosecution for any misdemeanor other than a conspiracy to commit a felony must be commenced within two (2) years after its commission. Since any violation by the defendant De Veau could have only occurred while he was an officer of Local 1346, and he has been suspended for almost three (3) years, he is protected from future prosecution by the statute of limitations.

(d) Appellee Requests a Brief Enlargement of Time Before Oral Argument if Such Be Necessary.

This appeal has been tentatively marked for argument on January 21st, 1960 and appellee's brief is due by January 13th, 1960. The facts cited in the within motion have come to the attention of the appellee only within the last two (2) days and it was felt advisable to bring them to the attention of this Court so that if the question of the mootness were decided in favor of the appellee this Court would be saved the necessity of hearing argument on a moot case. A brief enlargement of time and an adjournment of the oral argument, sufficient to permit the Court to examine this question of mootness are therefore requested by the appellee.

CONCLUSION

There is no bonafide justiciable controversy between the parties to this action, and the questions presented therein have become moot. Appellee requests a brief enlargement of time and an adjournment of oral argument to permit this Court to consider the question of mootness.

December 31st, 1959

Respectfully submitted,

THOMAS R. SULLIVAN,
Assistant District Attorney,
Attorney for Appellee.

JOHN M. BRAISTED, JR.,
Of Counsel.

APPENDIX A

Preamble

We, the men employed as Checkers, Clerks, Dockbosses, Timekeepers and baggage checkers and clerks on the various piers in the Port of New Jersey, New York & Vicinity, Brooklyn and Staten Island in order to concentrate our efforts for the rights of Labor, combine and unite, and adopt the following regulations for the Government of this Association.

* * *

Name, Objects and Jurisdiction

Section 1. This organization shall be known as the Checkers, Clerks, Dockbosses, Timekeepers, and Baggage Checkers and Clerks I.L.A. Local No. 1, located at New Jersey, New York, Brooklyn and Staten Island.

Section 2. The objects of the Union are to bring about and maintain the highest quality of workmanship, the regulation of wages and all matters relating to the welfare of the members of this organization.

Section 3. This Union shall have jurisdiction over all men employed as Checkers, Clerks, Dockbosses, Timekeepers and Baggage Checkers and Clerks by the various Steamship Companies, contracting Stevedores and Clerks in the Port of New Jersey and Greater New York & Vicinity and Staten Island.

Article 2

Section 1. Applicants must be male citizens of the United States over twenty-one (21) years of

age, of good character and endorsed by two members of the Union in good standing, who must appear with the applicant on presentation of his application to the Executive Board.

No New member shall be accepted into ILA Local Union #1 unless a vacancy arises upon the withdrawal, retirement or death of an active member.

No New member shall be accepted who are over forty years of age except where such applicants have worked at least five years in another craft of the International Longshoremen's Association.

Section 2. Applications shall be made on a regular numbered form provided by the Local. All applications shall be read at the regular monthly meeting of general body, with the names of the vouchers and shall be referred to the Executive Board for investigation. Applicants shall be examined at the next meeting of the Executive Board and its decision reported at the next regular meeting of the Local for approval by two thirds of the members present.

Section 3. Men admitted to membership must appear before The Body at a regular meeting and take the oath of obligation prescribed by the I.L.A.

Section 4. Any applicant gaining membership through false or misleading statements, shall be expelled from the Local, upon evidence being submitted showing such to be the case.

Section 5. In the event of the death or upon the retirement of any member in good standing, the oldest son or the next male descendant or adopted son (provided he shall have been adopted before fifteen years of age), shall be given priority for membership over all other applicants, subject to the approval of the Body at the next regular meeting.

Section 6. The son or sons of members shall be given preference over other applicants.

Section 7. There shall be no transfer cards acceptable by this Local at any time.

ARTICLE #3

Section 1. Every member of this Body must abide by the Constitution and By-Laws, Rules and regulations of the Local and avoid strife and discord with other members.

Section 1A. When attending meetings a member must be recognized by the Chair before he may address the Body. He will be limited to five minutes for his address. He may not ask for the floor again until all members wishing to discuss the question have had an opportunity to do so and then he must confine his remarks to two minutes on the same question. Any member who does not conduct himself in an orderly manner, or who is under the influence of intoxicating liquors shall be subject to expulsion from the meeting by the sergeant-at-arms and may be ordered before the Executive Board for trial by the chair.

Section 2. No member of this Local shall work for less than the prevailing wage scale, nor shall any

member negotiate an individual agreement with any employer.

Section 3. Where men are employed as office clerks, timekeepers or baggage-clerks (temporary or otherwise) they shall confine themselves to the office for the entire day.

Section 4. No member shall appear at the hiring hall before 7:55 A.M. nor remain there later than 9:00 A.M. The Penalty for the infraction of this rule will be a $25.00 fine for the first offense. Any member violating this rule is subject to trial before the Executive Board.

Section 5. Members shall not check more than one lighter hatch, gang, vehicle, car or car on float at a time. Dock Bosses, Checkers, Timekeepers, or baggage checkers, shall not take the place of any office clerk during overtime hours. It is a violation of a member's oath of obligation to do any unfinished checking that will deprive a member of work.

Section 6. Any member who shall violate his pledges or any provision of the Constitution and By-Laws of this Local, or of the Wage Agreement, or who shall work or commit any act against the Welfare of the Local shall be liable to a fine, suspension or expulsion. All subject matter pertaining to charges against a Brother member shall be mailed or delivered to the Secretary Treasurer who shall in turn refer it to the Executive Board. This Board shall report its findings to the Local at the next regular meeting.

Men employed during regular hours checking a lighter, hatch, gang, car or truck, shall be

entitled to continue such work during overtime hours, if such work is performed a member who has not been performing this work throughout the day shall not be permitted to take the place of said member. The member relieved shall prefer charges against offending member, who may be penalized if found guilty at the discretion of the Local.

Section 7. Any member found guilty of violating any section of the Constitution and By-Laws, or of the Wage Agreement, shall for the first offense be fine the sum of One Hundred Dollars, for the second offense he shall be fined the sum of Two Hundred Dollars, and for the Third offense, he shall be expelled from the Local. Any Clerk or Dock Boss found guilty of ordering a checker to violate any of the By-Laws shall be fined double the amount imposed on the Checker.

A member expelled from the Local may, not less than six months after such expulsion, make application for re-membership in regular form as a new member, paying full initiating fee. All appeals from any decision made by the Executive Board and sustained by the Body, must be made in writing within thirty days.

Article #4

Section 1. The initiation fee of this Local shall be Five Hundred Dollars ($500.00) plus Ten Dollars ($10.00) for the ILA, together with three months dues, payable in full, on approval of the applicant by two thirds of the Body. The

Officer performing the initiating ceremony shall impress upon the applicant his constitutional rights before accepting his fee.

Section 2. The dues of this Local shall be twelve dollars per quarter, plus one cent for every working hour, payable in advance to the Secretary-Treasurer at the Office of the Local. When payments are made to a third party, the person receiving such money shall be deemed the Agent of the Payee and not of the Local.

Section 3. Any member more than three months in arrears for dues or other obligations is suspended, he shall not be permitted to work, nor is he entitled to any benefits of the Local.

Section 3A. Any member six months in arrears for dues or other obligations shall be notified by registered mail and shall be unconditionally dropped from the Local unless extension is granted by the Executive Board. He cannot be reinstated as a member except by qualifying as a new member and paying full initiation fee.

Section 3B. The names of members not in good standing shall be given to the Business Agents for future reference.

Section 3C. Any suspended member may be restored to membership upon payment in full, of all arrears up to the time of reinstatement.

Section 3D. The use of the Local's name for personal gains is strictly forbidden.

Section 4. When a member through disability, is unable to work, he shall notify the Secretary-Trea-

surer and his dues shall be held in abeyance. His name will be placed on the sick list. The sick or disabled member shall appear in person every month or send Doctors Lines explaining disability. Failing in arrears is subject to be dropped from the Local. As a courtesy, the Secretary-Treasurer shall notify him by Registered return Mail, to the last address known, which shall be his legal address.

Section 5. If for any reason, it becomes necessary to levy an assessment upon the membership it may be done by a majority vote of the members present at a summoned meeting (for this specific purpose only).

Section 6. All fines and assessments due the Local must be paid before any money will be credited to as dues.

BY-LAWS

Article 1.

Sec. 1. The Officers of this Local shall be a President, 7 Vice-Presidents, 4 Secty-Treasurers, 4 Recording Secretaries, 4 Sergeant-at-Arms, 9 Business Agents, 12 Trustees, and 4 Delegates to the District Council.

Sec. 2. The Executive Board shall consist of the Officers of the Local.

Duties of Officers.

President.

Sec. 3. The President shall preside at all meetings of the Local, he shall appoint all committees not otherwise provided for, he shall counter-

sign all checks and legal documents and transact such other business as pertains to his office.

Sec. 3A. The President while acting as Chairman shall not debate nor enter any discussion, but simply act as Chairman. If he wishes to enter any discussion or defend his ruling on an appeal from the decision of the Chair he shall vacate the Chair and the Vice-President shall preside. In case of the disability of any Officer to perform the duties of his Office, or in the absence of any officer, the President may appoint a member to perform the duties of such officer until the President may appoint the duties of such officers until the disability be removed or action taken at a regular meeting of the Local or the Executive Board.

The President may, at his discretion, remove any appointive Officer. He shall have the deciding vote, in case of a tie, on any question. He shall be, Ex-Officio, a member of all committees. He shall with the 9 Business Agents and 4 members other than weekly salaried officers, represent the Local at the Wage Conference.

VICE-PRESIDENT.

The Vice-Presidents in order shall perform the duties of President in the absence of that Officer, they shall also perform the duties of chairman when called upon by the President to do so. These Vice-Presidents shall be numbered in order from one to seven.

RECORDING SECRETARIES

The Recording Secretaries shall keep a correct record of the transactions of each meeting and of all receipts and disbursements as reported by the Secretary-Treasurer.

SECRETARY-TREASURERS

The Secretary-Treasurers shall be the custodians of the funds of the Local and keep a correct record of same. They shall pay all bills of the Local, after an affirmative vote of the members present at a regular meeting. They shall make a report at every meeting of all money collected and expended, and balance on hand. They shall keep a record of the standing of members of the Local. They shall submit their books for audit to the Board of Trustees every six months, or at such other times as the Trustees may require. They shall also have their books audited by a Certified Auditor, at least twice a year. They shall with the President sign all checks and legal documents. They shall have a record of every member in good standing, at every meeting. They shall be at the office of the Local during regular working hours as designated in the Wage Agreement with the New York Shipping Association. They shall have charge of the rooms of the Local. They shall be bonded in the sum of Fifty Thousand ($50,000.00) cost of same to be paid by the local.

SERGEANT-AT-ARMS

The Sergeant-at-Arms shall assist the President in maintaining order and shall take charge of the door and inspect the Dues Card of each member and admit no one not in good standing, except by order of the President. They shall keep an attendance book, in which each member shall register his name. They shall act as Sergeant-at-Arms at the Executive Board meetings.

BUSINESS AGENTS

The Business Agents shall alternate districts every month. They shall endeavor to organize all non-union checkers, clerks, timekeepers and baggage clerks and checkers in the jurisdiction of the Local. They shall try to adjust amicably, all disputes between members and employers. The Business Agents shall have power to use such means, as in their judgment, are necessary to adjust the cause of complaint on any pier or ship. They shall attend every meeting and report to the Local, conditions in their respective districts. When they deem it necessary they may notify the President of an emergency, and he may convene the Executive Board to assist them.

DELEGATES TO THE DISTRICT COUNCIL

Delegates to the N. Y. District Council shall be composed of four members, elected by this Local, and the Business Agents, they shall attend all meetings of said Council and report to the Local all matters of interest pertaining thereto. In case of inability to attend, they shall notify the President, who may appoint some other member to represent the Local for such meeting.

EXECUTIVE BOARD

The Executive Board shall have power to make all necessary rules and regulations to carry into effect any of the purpose of the Local not otherwise provided for in the Constitution. If any vacancy occurs in the Executive Board of any Elective Office of the Local, between regular meetings, such office may be filled temporarily by the Executive Board by appointing a member of the Local to hold office until the next regular meeting.

All recommendations of the Executive Board shall be subject to the approval of the membership at the next regular

meeting. Unexcused absence of any member of the Executive Board from three (3) consecutive Executive, special or regular meetings shall be construed to be a resignation from office, and such resignation to be reported to the President of the Executive Board. The Executive Board shall act as a Trial Board on all charges which may be preferred against any member, it shall have power to summon witnesses, preferring charges against any member failing to answer such summons, testimony shall be taken and findings reported to the next regular meeting of the Local.

Any member of the Executive Board preferring charges against a member shall not be allowed to cast a vote on the question of his guilt.

TRUSTEES

The Board of Trustees shall meet within one week after they have been installed in office and elect one of their members to be chairman. The Trustees shall examine the accounts of the Secretary-Treasurers at least once every six months, and report the condition of same in writing, to the Body. They shall compile reports of the Secretary-Treasurers at least once every year. The Trustees shall examine all bills referred to them by the Local and report upon same. They shall examine and audit all accounts, of all committees, and report to the Body on same.

Article 2

NOMINATION AND ELECTION OF OFFICERS

Nominations for officers of this Local shall be made at the first regular meeting in November of 1960, and shall be subject to the following conditions. There shall be sectional representation in the nomination and election of officers whereby the sections shall be known as New Jersey, Northern Manhattan (above 14th Street)—Southern Manhattan

and Staten Island and Brooklyn. In order to qualify for nomination, it will be necessary for the Nominee to have worked in the section, in which he is running, for at least one year. At the November meeting in an election year, the Executive Board shall recommend to the Body the increase or decrease in salaries of the Secretary-Treasurers and the Business Agents. Whatever compensation the Body agrees on shall be placed on the ballot for the general election. Two thirds of members voting in the affirmative shall be necessary for adoption. Elections shall be conducted by the Honest Ballot Association.

A. Any member not present at the duly designated meeting, as heretofore provided in these By-Laws, shall not thereby be rendered ineligible for nomination to office in this Local, provided he notifies the Local, that it is his intention to run for office.

B. No member shall be nominated who owes the Local three or more months dues or who is indebted to the Local for fines, assessments or other liabilities.

C. No member may be nominated for office who has not been a member for one year.

D. All officers shall be eligible for re-election or nomination for any other office and their names to appear first on the ballot. In the case of two officers nominated for the same office, the senior officer's name shall appear first.

D-a* No one shall be nominated who has not attended four (4) meetings and signed the attendance book, from January to November inclusive in the year of election.

E. The Officers shall be elected the Saturday preceding the first meeting in December and the Nominees receiving the largest number of votes cast by the members voting shall be declared duly elected.

F. The polls shall be open on the designated Saturday from 10 A.M. to 6:30 P.M.

G. No one shall be allowed to vote at a regular election of Officers who has not been a member for three months or who owes three months dues, or who is indebted to the Local for fines or other liabilities, or who does not have his Coast Guard pass for Identification.

Article 3

Installation of Officers

The newly elected Officers who have qualified according to the Constitution shall be installed at the first regular meeting in December and shall assume their respective office and duties on the first day of January, if one or more of the Officers are absent they shall be installed at the next regular meeting at which they are present, but no officer who is required to give bond shall be installed until this obligation has been duly complied with.

The Delegates to the Wage Scale Conference shall consist of the President and four members from the Body (elected by the membership at the Wage Scale Meeting). The Delegates shall be compensated from the funds of the Local, such compensation to be decided by the membership at a regular meeting. If the condition of Local Funds warrants the selection of Business Agents to act at the Wage Scale Conference their compensation shall be decided by the membership.

Article 4

WITHDRAWAL CERTIFICATES

Any member leaving the jurisdiction of the Local or leaving the business and not indebted to the Local, shall upon application (and payment of $5.00) to the Secretary-Treasurer, be entitled to a certificate of withdrawal, signed by the President of (Vice-President) and Secty-Treasurer with the seal of the Local. This withdrawal card to be made up in triplicate (one copy for Withdrawee—one copy for the I.L.A. Records). Any member receiving a Withdrawal certificate shall surrender his due book to the Secretary-Treasurer before receiving the Certificate of Withdrawal. A Member receiving a withdrawal certificate and not having worked in this jurisdiction as a steamship clerk, checker, dock-boss, timekeeper or baggage-clerk or checker may on his return, deposit same with the Secretary-Treasurer and appear before the Executive Board to acquire membership, provided, he has in no way violated any of the laws in any Labor Organization. Any member enjoying this privilege and electing to return to the jurisdiction of this Local, within a period of less than one year, shall be obliged to pay all back dues from the date of issue of said Withdrawal Certificate. Withdrawal Cards must be renewed annually; a charge of five dollars shall be made for each renewal. A separate book record (in triplicate form) shall be kept by the Secretary-Treasurer of all withdrawals and all withdrawals shall be dated in numerical form.

No member of this Local shall retain active membership in any other local of the International Longshoremen's Association.

TRIALS.

Sec. 1. Any member who shall violate his pledge, or any provision of the Constitution and By-Laws of this Local, or who shall work or do

any act against the Welfare of this Local, shall be liable to a fine, suspension or expulsion and his trial shall be held before the Executive Board, upon charges preferred in writing and a majority of said Board shall determine said charged and render judgment thereon, and said Board if hereby authorized to expel any member for the causes aforesaid, subject to the approval of the membership.

Sec. 2. Should charges be preferred against any member of said Board he shall not be competent to act with said Board during said trial and their determinations.

Sec. 3. If charges be preferred against any member of the Local and they are not proven beyond a reasonable doubt, the Executive Board shall take such action as they may deem necessary.

Article 6

PROPERTY OF THE LOCAL

All Officers of the Local, at the expiration of their term of office shall surrender to their successors all books, money or other property of the Local, that may be in their possession.

Article 7

Sec. 1. All money belonging to this Local shall be deposited by the Secretary-Treasurer in such banks or trust companies that have been approved by the Trustees, in the name of the Local, but the amount on deposit in any bank or trust company (with the exception of the working fund), shall not exceed the sum of Ten Thousand Dollars ($10,000.).

Sec. 2. No money from the Funds of this Local shall be loaned or presented to any member of the Local or any other person.

Sec. 3. No member shall hold more than one salaried office at one time.

Article 8

Regular meetings shall be held on the second Monday or Tuesday, other than June, July and August, at a suitable hall designated for that purpose. Special meetings may be called by the President, or on the written request of ten members, provided that no business shall be transacted at such Special meetings, other than specified in the call.

Article 9

No general strike may be called, or members of this Local shall not join in any strike, until the cause of complaint is laid down before the Executive Board of the ILA at Headquarters, for approval. It shall require a unanimous vote of the members present at an Executive Board Meeting, or a two thirds vote of the membership present, at the meeting of the Local, to order a strike after approval from Headquarters.

Article 10

All amendments to the Constitution and By-Laws shall be made in writing and read at three consecutive meetings. Notice of such proposed amendments shall be given by mail by the Secretary of all members in good standing at least four days previous to the final reading. A two-thirds vote of the members present and voting shall be necessary for the adoption of any amendment. An amendment rejected shall not be presented again within one year, nor shall a substitute with the same intent be presented.

ARTICLE 11

No provision of the Constitution and By-Laws shall be suspended at any time.

ARTICLE 12

No member of this Local shall be exempt from payment of dues, except he has been a dues paying member for twenty-five (25) consecutive years and has reached the age of sixty-five (65) years and unable to work, shall be given Life Membership Card and is entitled to all benefits.

ARTICLE 13

This Local shall not be dissolved while there are ten (10) objecting members.

ARTICLE 14

Complaints or grievances of members shall be made to the Business Agent or brought up at any regular meeting for discussion, under the heading of "good and welfare."

ARTICLE 15

Complaints of employers shall be entertained and investigated by the Business Agents and in their discretion, be brought before the Executive Board. A majority vote of the members present, at any such meeting, may report the case of the offending member to the Local for further investigation, said member to appear before the Executive Board upon notification in writing.

ARTICLE 16

All appeals from rulings of the Chair upon Parliamentary questions to be decided by the "Cushing Manual."

Article 17

Attendance of Two Hundred (200) members shall constitute a quorum for regular or special meetings. All previous By-Laws, amendments, etc., for the government of the Local are hereby declared null and void. This Constitution and By-Laws to be effective from and after April 1st, 1957.

Legal holidays are: New Year's Day; Lincoln's Birthday; Washington's Birthday; Good Friday; Decoration Day; Fourth of July; Labor Day; Columbus Day; Election Day; Armistice Day; Thanksgiving Day; Christmas Day and such other National or State Holidays as may be proclaimed by Executive Authority.

Article 18

Duties of a Shop Steward

A Shop Steward shall examine all dues books to ascertain good standing of the Checker, Clerk, etc. See that the Seniority Rules are complied with. In case of any dispute he speaks for the men and where a dispute cannot be amicably adjusted he shall call a Business Agent and let him handle the situation from there on in no instance shall the shop steward call for a work stoppage. It is to be thoroughly understood that a Shop Steward is required to assist in the receiving or delivery of cargo, but it is also understood that he must not be assigned to any task that will interfere with him performing his duties as shop steward.

Article 19

All Delegates at Conventions, Wage Scale Conferences and District Council meetings shall and must vote as a unit.

Notice to Members

1. All dues must be paid in advance.

1A. Any member not attending four meetings in one fiscal year shall be assessed the sum of five dollars

1B. Any member not voting for Officers of the Local shall be assessed the sum of five dollars ($5.00), reasonable excuses may remit these assessments in 1 A and 1 B.

2. Checkers, Clerks, etc. must always have their dues cards with them when working at checking etc., so that Business Agents or Stewards can observe if they are in good standing. Any member failing to carry due-card is liable to be suspended from work by the Business Agent or Steward.

3. When a member desires to leave the Local for any other Business, he should procure a withdrawal card from the Secty-Treas, after dues, assessments and withdrawal fees are paid up to date. If the member returns with the withdrawal card within one year he must pay dues from the issuing date of the withdrawal card. If he returns after one year, he is required to pay three months dues in advance.

4. Any member three (3) months in arrears is not in good standing, and any member six (6) months in arrears will be dropped from the books.

5. Members when sick or injured should notify the Secty-Treasurer immediately in order to protect their standing in the Local.

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 71.

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR. as District Attorney of Richmond County.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL.

THOMAS W. GLEASON,
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80 Broad Street,
New York 4, N. Y.

THOMAS W. GLEASON,
JULIUS MILLER,
Of Counsel.

348 Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 71.

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR.,
as District Attorney of Richmond County.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL.

Appellee has moved this Court to dismiss the appeal on the grounds that the questions presented have become moot. Appellee bases his motion on the ground that Local 1346, of which appellant was Secretary-Treasurer is no longer in existence. It is clear from the affidavits of John Dwyer (Appendix A) and William V. Bradley (Appendix B), that the position of appellant is the same now as it was when the action was commenced. The action which appellee took to deprive appellant of his position as Secretary-Treasurer of Local 1346 continues to deprive appellant of the position he would have today as one of the Secretary-Treasurers of Local 1.

The appellee attempts to create the impression that Local 1 is a new entity with no relationship to the former Local 1346. This is clearly controverted by the affidavit of John Dwyer (Appendix A). This affidavit, together

with the regulations and By-laws of Local 1 (Appendix A of Appellee's Motion to Dismiss) outline the establishment and composition of Local 1. The affidavit indicates that Local 1 was the result of a merger of the four checker locals in the Port of New York, including Local 1346, and that Local 1 is therefore the successor to Local 1346, and the three other locals involved in the merger. All members of the four locals thereafter came under the jursidiction of Local 1. As further shown by the affidavit, and the By-laws of Local 1, Article 1, Section 1, all officers of the four locals were to continue as officers of the successor, Local 1. In fact, the By-laws provide for four Secretary-Treasurers, one from each of the locals, although there are at present only three serving in this capacity. This is because the appellant, De Veau was under suspension at the time of the merger, and is still under suspension, thereby being prevented from assuming the office as one of the Secretary-Treasurers of Local 1, a position which rightfully belongs to him.

Local 1, as successor to Local 1346 continues to collect dues from members in Staten Island (Richmond County), within the jurisdiction of appellee. There can be no doubt that were Mr. Bradley, the President of International Longshoremen's Association, to lift the suspension of appellant and permit him to serve as a Secretary-Treasurer of Local 1, Bradley and all other officers of Local 1, and the International Longshoremen's Association immediately would be subject to prosecution by the appellee for violation of Section 8. The courts of the State of New York have determined that appellant's conviction constituted a felony under the provisions of Section 8.

Apparently, appellee treats this action as an action against him as an individual. Whether appellant is barred

by the action of the District Attorney of Richmond County, his successor, if any, or the District Attorney of any other County of the State of New York, is immaterial. He is barred nevertheless.

The motion of appellee makes much of the fact that appellant is in no danger of prosecution as a result of violation of Section 8. The questions presented by this appeal are in no way related to whether or not appellant can be prosecuted. *The constitutionality of Section 8 and its effect in depriving appellant of his right to work is the issue.*

The cases cited by appellee to support the contention of mootness have no relation whatsoever to the case at bar.

In *Mills* v. *Green*, 159 U. S. 651, appellant sought the right to vote in an election that had already taken place. This Court could not possibly grant any effective relief to appellant.

In *California* v. *San Pablo and Tulare Railroad*, 149 U. S. 308, the State of California sought to recover taxes from the defendant railroad. This Court found that the debt had been extinguished by the railroad's offer to pay and its deposit of money in the bank, which according to California law had the same effect as actual payment. This Court therein stated:

> "• • • And the State has obtained everything that it could recover in this case by a judgment of this court in its favor."

The case at bar is readily distinguishable. A decision favorable to appellant will grant him immediate and *effectual* relief. It would restore him to the position he would have succeeded to as Secretary-Treasurer of Local 1, but for the action of appellee. It will also permit him to

seek re-election at the elections to be held in December 1960. *In essence, it will grant him the relief sought at the commencement of this action.*

To treat the questions presented by this appeal as moot would result in a grave miscarriage of justice leaving unanswered constitutional questions of vital significance in an existing controversy to appellant, the several states and the Federal government.

Conclusion.

The motion to dismiss should be denied in all respects.

THOMAS W. GLEASON,
Attorney for Appellant.

THOMAS W. GLEASON,
JULIUS MILLER,
of Counsel.

Appendix A.

Affidavit of John Dwyer.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 71.

GEORGE DE VEAU,
Appellant,
against
JOHN M. BRAISTED, JR., as District Attorney of Richmond County.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN DWYER, being duly sworn, deposes and says:

I am a Business Agent of Checkers, Talleymen & Clerks, Local No. 1, I. L. A., and am fully acquainted with the facts of its organization. I was formerly Business Agent of Local 1346.

During the year 1957, the officers of Locals 1346, 975, 874 and 1261 decided that it would be to the advantage of the membership to merge into one local. With the approval of the membership of the four locals, this step was taken. It was agreed that all the officers of the four locals would continue as officers of the new merged Local #1. The members of the four locals were thereafter under the jurisdiction of Local #1. In addition to the members of these four locals, all checkers of Local 1827 (a catch-all

local) were also permitted to come into Local #1. The Business Agent of Local 1827 also became a Business Agent of Local #1.

Local #1, since the merger, has had three Secretary-Treasurers although the By-Laws, Article 1, Section 1, provide for four. The reason there are only three Secretary-Treasurers is because George De Veau, the Secretary-Treasurer of Local 1346, was under suspension and remains under suspension.

The term of all the officers runs until December, 1960. Nominations will be made for new officers in November 1960 and the elections will be held in December 1960.

The jurisdiction of Local 1346 included all of Staten Island, Manhattan below 14th Street on the North River and all piers on the East River, New York City.

(s) JOHN DWYER

Sworn to before me this
11th day of January, 1960.

(s) JOSEPH P. HENNESSEY
Notary Public, State of New York
No. 48-1769850
Qualified in Richmond County
Term Expires March 30, 1961

Appendix B.

Affidavit of William V. Bradley.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 71.

GEORGE DE VEAU,
Appellant,
against
JOHN M. BRAISTED, JR., as District Attorney of Richmond County.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

WILLIAM V. BRADLEY, being duly sworn, deposes and says:

I am President of the International Longshoremen's Association (AFL-CIO).

During December 1956, I was advised by the District Attorney's office of Richmond County, State of New York, that George De Veau, Secretary-Treasurer of Local 1346, had been convicted of a felony and was further advised of the consequences under Section 8 of the Waterfront Commission Act if he remained in office. In order to protect the Union and other officers I was forced to suspend De Veau from office.

The suspension of De Veau continues and necessarily must continue as long as Section 8 is effective.

(s) WILLIAM V. BRADLEY

Sworn to before me this
11th day of January, 1960.

(s) JOSEPH P. HENNESSEY
Notary Public, State of New York
No. 48-1769850
Qualified in Richmond County
Term Expires March 30, 1961

Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

GEORGE DE VEAU,

Appellant,

against

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR WATERFRONT COMMISSION OF NEW YORK HARBOR, *AMICUS CURIAE*

WILLIAM P. SIRIGNANO,
General Counsel,
Waterfront Commission of
New York Harbor,
15 Park Row,
New York 38, N. Y.

Attorney for Amicus Curiae.

IRVING MALCHMAN,
JEROME J. KLIED,
LEON SCHNEIDER,
Assistant Counsel,
of Counsel.

INDEX

CITATIONS

Supreme Court of the United States

OCTOBER TERM, 1959

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GEORGE DE VEAU,

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against

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR WATERFRONT COMMISSION OF NEW YORK HARBOR, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The instant appeal to this Court challenges the constitutionality of Section 8 of the Waterfront Commission Act, which Act was enacted by the States of New York and New Jersey in 1953 (N. Y. Laws 1953, c. 882 (McK. Unconsol. Laws 6700aa *et seq.*); N. J. Laws 1953, c. 202 (N. J. S. A., 32:23-1 *et seq.*)) for the purpose of eliminating various evils in the port of New York that had been publicly exposed by various governmental bodies. Part of the Act encompasses

the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey approved by Congress (67 Stat. 541), and creates the Waterfront Commission of New York Harbor as a bi-state administrative agency with broad investigative, licensing and regulatory powers respecting matters that affect the port of New York. Consequently, the interest of the Waterfront Commission in this case is that it constitutes an attack upon the constitutionality of an important section of the Waterfront Commission Act.

There is on file with the Clerk of this Court the written stipulation of both parties hereto consenting to the within appearance by the Waterfront Commission as *amicus curiae*.

Summary of Argument

A. This Court has before it for consideration a motion by appellee to dismiss the appeal as moot. It is submitted that the controversy has become moot by reason of circumstances outside the record, that any determination of this Court would be wholly ineffectual and that, therefore, the Court lacks jurisdiction of the instant appeal. The position appellant held as an officer of Local 1346, ILA (Ind.) and the Local itself are no longer in existence. In addition, the former members of Local 1346 are now under the jurisdiction of Local 1, a local located in New York County, New York, outside the jurisdiction of appellee-District Attorney. Consequently, the threat of prosecution by the appellee no longer exists and, therefore, there is no controversy between the parties to this appeal.

Appellant is in reality seeking a determination from this Court on the hypothetical question whether any other district attorney could properly invoke Section 8 to preclude the appellant from serving as an officer in a local

other than Local 1346. This Court will only decide actual cases and controversies.

B. This Court should not reach the important constitutional questions alleged by appellant since he has steadfastly refrained from exhausting the administrative remedies specifically provided in Section 8 for relief from the prohibition against felons in waterfront unions. This Court must decide the issue of exhaustion of administrative remedies even though the court below stated that its rejection of appellant's complaint was not based on any holding that appellant had failed to exhaust his administrative remedies.

The contention that the procedure of the agency having the power to grant such certificate does not satisfy due process and that the agency's determination is not subject to judicial review is entirely supposititious since appellant has not sought the relief provided and one may not complain about the inadequacy of an administrative hearing for which he has not applied.

C. Section 8 does not conflict with the National Labor Relations Act. The legislative history of the Waterfront Commission Act clearly shows the local pressing need for its enactment. The legislation was the result of public indignation against racketeering and other evil conditions on the waterfront in the Port of New York which, as revealed in public investigation, threatened the economic primacy of the Port. The problem of criminal influence in waterfront unions and the misuse of union funds was of particular concern. Congress, itself, recognized the local need in the port of New York to bar criminals from acting as waterfront union officers and agents.

The imperative local police needs of the States of New York and New Jersey justify the alleged interference with the claimed right to select even convicted felons as union

officers. The interference, if any exists, is surely minimal. Congress in enacting Section 7 of the National Labor Relations Act did not intend to prevent the States from exercising their traditional powers to cope with a local police problem of the most serious proportions as documented in the history of Section 8. Within the test of *Kelly* v. *Washington*, 302 U. S. 1, Section 8 is not so directly and positively repugnant to Section 7 of the National Labor Relations Act as to be unconstitutional and, indeed, Section 8 is affirmatively consonant with the purposes and objectives of the National Labor Relations Act.

Hill v. *State of Florida*, 325 U. S. 538, relied upon heavily by appellant, is readily distinguishable. The Florida statute in the *Hill* case constituted an outright attempt to regulate collective bargaining by State authorities. Moreover, there was a significant failure of any showing by Florida of a pressing need for the exercise of local police powers, in contradistinction to the imperative local need that led to the enactment of Section 8.

The provisions of Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519) vitiates the claim of an absolute freedom of employees to select even convicted felons as union officers or agents. The congressional findings in the Disclosure Act and the legislative history of the Disclosure Act show that legislation prohibiting criminals from holding union office is affirmatively consonant with the objectives of the National Labor Relations Act and not in interference with any rights conferred by the National Labor Relations Act.

Appellant's contention that the subject matter of Section 8 has been entirely pre-empted by the National Labor Relations Act is without substance in view of repeated holdings by this Court that in the area of labor relations federal legislation has not so pre-empted the field as to preclude an otherwise valid exercise of the state police powers.

D. Appellant's claim that Section 8 of the Waterfront Commission Act has been pre-empted by Section 504(a) of the Disclosure Act is not properly before this Court since it was not raised below. Since the Disclosure Act was enacted after the New York Court of Appeals rendered its decision, the judgment being appealed from in no way affects appellant's claim under the Disclosure Act and is not *res judicata* with respect thereto. Therefore, the decision of the New York Court of Appeals should be affirmed. *State Farm Automobile Company* v. *Duel*, 324 U. S. 154.

In any event, Section 8 is not pre-empted by Section 504(a) of the Disclosure Act. The Disclosure Act explicitly provides that it does not reduce or limit responsibilities under such a state law (Section 603). Moreover, the legislative history of the Disclosure Act clearly demonstrates that Congress carefully considered several arguments opposing the preservation of state provisions concerning matters covered by the Disclosure Act which are substantially similar to the contentions of appellant, and rejected these arguments by specific enactment to the contrary. Apart from the express provisions of the Disclosure Act, "the [claimed] repugnance or conflict" is "[not] so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' ". *Kelly* v. *Washington, supra*, p. 10. Rather, the provisions of Section 8 to protect waterfront union funds from criminal influence and domination are entirely consistent with the provisions of Section 504(a) of the Disclosure Act and are best effected by local state officials.

E. The prohibition of Section 8 of the Waterfront Commission Act against felons from acting in key union positions is reasonable and does not violate due process. A state legislature may regulate an area of legitimate local concern by generally excluding from an occupation or employment any person who has been convicted of a felony, even though no provision is made for removal of the dis-

qualification. *Hawker* v. *New York*, 170 U. S. 189. The reasonableness of Section 8 is therefore entirely evident since it provides for removal of the felony disqualification. The claimed inadequacy of applying for a pardon from the Governor or a certificate of good conduct from the Board of Parole is suppositious since appellant never in fact pursued either of these remedies. Therefore, appellant's contention that the procedures of the Board of Parole are inadequate and therefore render Section 8 invalid by reason of the due process requirements of the Constitution is premature at this time. In any event, these contentions are entirely without merit since due process does not necessarily require a hearing before the Board of Parole or that its determinations be judicially reviewable. Moreover, there is no showing that a denial of a certificate of good conduct by the Board of Parole is not judicially reviewable.

The constitutional provisions against *ex post facto* laws and bill of attainders do not apply to Section 8 of the Waterfront Commission Act. *Hawker* v. *United States*, *supra*. The evident purpose of the Legislature in enacting Section 8 was to protect waterfront union funds and members from gangster control, and the claim that the Legislature intended to additionally punish any particular individual is entirely unsubstantiated and should be rejected by this Court.

ARGUMENT

I

The appeal is moot and should be dismissed.

Appellee has moved this Court to dismiss the instant appeal as moot and by order of this Court consideration of the said motion has been postponed to the hearing of the case on the merits. *DeVeau* v. *Braisted*, No. 71, U. S. Sup. Ct., Jan. 25, 1960 (28 U. S. Law Week 3227). The Waterfront Commission, as *amicus curiae*, also submits to this Court that the instant appeal is moot upon facts outside of the record and that this Court should thus not proceed to a determination for lack of jurisdiction.

This is an appeal from an order and judgment of the Court of Appeals of the State of New York affirming a judgment of the Appellate Division, Second Department, which affirmed the dismissal by the Supreme Court, Richmond County, of an action brought by appellant DeVeau, one Daniel Lowery and one David Honan, individually and as members of Local 1346 of the ILA (Ind.) and on behalf of all other members of said Local 1346.* The action sought to have Section 8 of the Waterfront Commission Act declared void as being in conflict with the National Labor Relations Act and to enjoin the appellee District Attorney from prosecuting or threatening to prosecute the appellant or any other person collecting dues on behalf of Local 1346 ILA (Ind.) in violation of Section 8 of the Waterfront Commission Act and from interfering with the right of members of Local 1346 to select agents and representatives of their own choosing for collective bargaining.

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* The instant appeal has been brought solely by George DeVeau, individually. Plaintiffs Lowery and Honan, as individuals and as members of Local 1346, ILA (Ind.) are not parties to this appeal and no appeal has been taken in behalf of all other members of Local 1346 (R. 60-1).

The complaint, *inter alia*, alleges that Local 1346 was and still is an unincorporated association of 1,100 members with offices located at 523 Bay Street, Borough of Richmond, County of Richmond, City and State of New York (R. 6); that Local 1346 was and still is a labor union and functioning as such in New York and New Jersey (R. 6); that appellant, George DeVeau, was and still is a member of Local 1346 (R. 6); that the appellee would prosecute forthwith under Section 8 of the Waterfront Commission Act any person who continued to collect dues for and on behalf of Local 1346 while appellant remained an officer of the Local (R. 7); that appellant is precluded from restoration to his former elected position as an officer [of Local 1346] unless the relief which is sought in this action is obtained (R. 10); that a judicial determination is necessary in order that the rights and liabilities of any members collecting dues for Local 1346 under Section 8 of the Waterfront Commission Act may be determined and adjudged (R. 12); and that because of the aforesaid threat of prosecution made by the appellee, the appellant has suffered and will continue to suffer irreparable damage (R. 12).

In the summer of 1957, subsequent to the initiation of the instant action, four checker locals then existing in the port of New York were merged into a new local chartered by the ILA, known as Local 1, ILA (Ind.), with offices at 250 West 57th Street, New York County (beyond the jurisdiction of the appellee District Attorney), and all members of the then existing checker locals, including Local 1346, became members of Local 1.* Local 1346 then ceased to operate and went out of existence. Some of the former officers of Local 1346 became officers of Local 1.

In view of this change of circumstances not in the record before this Court, all of the allegations of the com-

* Checkers are longshoremen employed to engage in direct and immediate checking and accounting of waterborne freight and in the recording and tabulation of the hours worked at piers and other waterfront terminals by waterfront workers.

plaint set forth above no longer obtain. Thus, "Local 1346" is no longer a labor union representing 1,100 checkers and functioning as such in the County of Richmond or anywhere in the States of New York and New Jersey; the appellant is not and can no longer be restored to a position as an officer of the nonexistent "Local 1346" and, thus, can no longer suffer irreparable damage resulting from his suspension (by the President of the ILA) as an officer of "Local 1346"; there are no longer members collecting dues for or on behalf of "Local 1346" and, thus, a judicial determination as to rights and liabilities of such members would be meaningless; and, finally, there is and no longer can be a threat of prosecution or a prosecution by the appellee herein.

Upon these facts, it is apparent that there no longer exists a case or controversy between the present parties to the action. Whether there is a case or controversy between appellee and others, formerly parties to this proceeding, is not before the Court in this appeal (R. 60-1).

It is clear, of course, that where a controversy has become moot and this Court's judgment would be wholly ineffectual, this Court will not proceed to a determination of the case. *St. Pierre* v. *United States*, 319 U. S. 41; *Brownlow et al.* v. *Schwartz*, 261 U. S. 216. Moreover, this Court will not, upon the facts herein, determine what apparently the appellant seeks to have determined—the abstract question of whether a district attorney in another jurisdiction (e.g. New York County), who is not a party to the instant proceeding and has no adverse legal interest to appellant, may properly take action under Section 8 of the Waterfront Commission Act to preclude appellant from serving as an officer in a different waterfront local. *People of the State of California* v. *San Pablo and T. R. Company*, 149 U. S. 308; *Aetna Life Insurance Co. of Hartford, Conn.* v. *Haworth*, 300 U. S. 227.

II

This Court should not reach the grave and important constitutional questions sought to be tendered by appellant because he has steadfastly refrained from exhausting or invoking the administrative remedies specifically provided by Section 8 of the Waterfront Commission Act.

A. Appellant's Sedulous Cultivation of His Disability Under Section 8.

Section 8 of the Waterfront Commission Act prohibits any person from collecting dues on behalf of any labor organization representing employees registered or licensed pursuant to the Waterfront Commission Act if any officer or agent of such labor organization has been convicted of a felony "unless he [the convicted felon] has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability". Section 242.3 of the Executive Law of the State of New York empowers the Board of Parole to grant a certificate of good conduct to any person convicted of a crime who for a period of not less than five consecutive years since his conviction shall have conducted himself in a manner warranting such grant.

Section 242.4 of the Executive Law further provides as follows:

> "The board, for the purpose of any investigation in the performance of its duties, made by it or any member thereof, shall have the power to issue subpoenas, compel the attendance of witnesses and the production of books, papers and other documents pertinent to the subject of its inquiry. It or any member thereof may administer oaths and take the testimony of persons under oath."

Thus, while Section 8 prohibits felons in waterfront unions, it specifically provides for administrative relief from such prohibition. One of the most remarkable aspects of this case, and one which we respectfully submit warrants the most careful consideration by this Court in view of the delicate constitutional questions sought to be tendered by appellant, is the significant contrast between appellant's studious indifference, on the one hand, to his administrative remedies under Section 8 and his determined and energetic pursuit, on the other, of his judicial remedies, emphasizing therein the claimed hardship that Section 8 imposes upon him.

As to his administrative remedies, appellant alleges in his complaint that in 1920, when he was 19 years old, he and another person converted an automobile for the purpose of a "joyride" and that in 1922 he received a suspended sentence on a plea of guilty to attempted grand larceny in the first degree in the Court of General Sessions, New York County (R. 8). This is appellant's sole conviction and since more than five years (actually 38 years) have elapsed since his conviction, his application to the Board of Parole for a certificate of good conduct to remove his disability under Section 8 would certainly seem to warrant serious consideration. However, appellant has steadfastly refrained from applying for the relief explicitly afforded by Section 8 itself.

Respecting his judicial remedies, however, appellant has been energetic and determined. Thus, immediately upon enactment of Section 8 into law in 1953, appellant instituted suit in the Federal District Court challenging the constitutionality of Section 8, which suit was dismissed upon the ground, *inter alia*, that no prosecution was imminent under Section 8. *Linehan* v. *Waterfront Commission of New York Harbor*, 116 F. Supp. 401 (S. D. N. Y., 1953). When this obstacle to judicial suit was eliminated in 1957 by instant threat of prosecution by defendant District

Attorney Braisted, this action was instituted forthwith by order to show cause. Appellant's determined pursuit of his judicial remedies stands in marked contrast to appellant's indifference to his administrative remedies under Section 8 ever since its enactment in 1953.

B. The Issue of Exhaustion of Administrative Remedies Presents a Federal Question for Determination by This Court.

The court below, the New York Court of Appeals, in its opinion herein states that its rejection of appellant's complaint is not based on any holding that appellant has failed to exhaust his administrative remedies (R. 51). However, this decision is not in any way binding on this Court which, under settled principles of constitutional adjudication, must decide this question for itself. "[This Court] has followed a policy of strict necessity in disposing of constitutional issues" and "every application [of this policy] has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty." *Rescue Army* v. *Municipal Court of the City of Los Angeles*, 331 U. S. 549, 568, 569. This Court further stated in *Rescue Army, supra*, at pages 570-71:

> "Moreover the policy [of strict necessity in disposing of constitutional issues] is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts, the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the

federal system and this Court's appropriate place within that structure.

* * *

"The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system."

Hence, the question, for example, of standing to challenge the constitutionality of a state statute has been decided by this Court entirely independently of what determination might have been made with respect to this question by the state court whose decision was being appealed to this Court. *Tileston* v. *Ullman*, 318 U. S. 44; *Doremus* v. *Board of Education*, 342 U. S. 429. This Court has also reached the same result with respect to the question of ripeness for review of state statutes and state administrative action. *Conn. Mutual Life Insurance Co.* v. *Moore*, 333 U. S. 541; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507. And finally, the same holds true with respect to the question of exhaustion of administrative remedies. *Staub* v. *City of Baxley*, 355 U. S. 313.

C. Appellant Should Be Required to Exhaust His Administrative Remedies.

Where, as here, a statute imposes a prohibition or burden and affords the right to apply for administrative relief from such prohibition or burden, no action of an equitable or declaratory nature challenging the constitutionality of such prohibition or burden may be maintained until administrative remedies have been exhausted. E.g., *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (applicability and constitutionality of Renegotiation Act may not be challenged in injunctive and declaratory judgment action by government subcontractor who had right to institute proceedings in Tax Court for a redetermination of its excess profits, notwithstanding fact that subcontractor's customers were being immediately directed to pay to United States monies owing to subcontractor); *Gorham Mfg. Co.* v. *State Tax Commission of New York*, 266 U. S. 265 (failure of foreign corporation on which State Tax Commission imposed annual franchise tax to apply to commission for revision of tax precludes suit to enjoin collection of tax on theory that statute violated due process clause of Fourteenth Amendment and commerce clause of Constitution).

It is contended that the procedure of the Board of Parole does not satisfy due process and that the Board of Parole's determination is not subject to judicial review. Assuming, *arguendo*, that the Board of Parole's procedure does in fact fail to comport with constitutional requirements of due process, then by necessary hypothesis judicial review would be available. In any event, the short answer to this argument is that it is entirely supposititious and that one may not complain about the inadequacy of an administrative hearing for which he has not applied. Certainly, Section 242.4 of the Executive Law (*supra*, p. 10) comports with every possible requirement of due process on its face in providing that the Board of Parole shall have the power of subpoena and the power to administer

oaths and to take the testimony of persons under oath. Hence, the holding by this Court in *Yakus* v. *United States*, 321 U. S. 414, 434, is strikingly apposite here:

> "[W]e cannot pass upon action which might have been taken on a protest by petitioners who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he [the administrator] would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners."

To precisely the same effect are, e.g., *Lerner* v. *Casey*, 357 U. S. 468, 473; *Lehon* v. *Atlanta*, 242 U. S. 53, 55-6.

Indeed, the requirement that one exhaust his administrative remedies has particular force when constitutional questions are involved. As this Court said in *Aircraft & Diesel Corp.* v. *Hirsch*, *supra*, at page 772:

> "[T]he very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the Tax Court's final performance of its functions. When that has been done it is possible that nothing will be left of appellant's claim."

Moreover, in this connection, it should be noted that the renegotiation determinations by the Tax Court involved in *Aircraft & Diesel Corp.* v. *Hirsch*, *supra*, were apparently not subject to judicial review.

Finally, it bears emphasis that this is not a case involving review in this Court of a judgment of conviction under an allegedly unconstitutional statute or ordinance, e.g., *Staub* v. *City of Baxley*, *supra*, in which circumstance the considerations respecting exhaustion of administrative remedies are of course entirely different. Cf. *Yakus* v.

United States, supra. Nor is this a situation where to require the pursuit of administrative remedies would in and of itself be violative of a substantive constitutional right, *Public Utilities Commission of California* v. *United States,* 355 U. S. 534, 540, such as, for example, the necessity of applying for a license in order to exercise First Amendment rights. Cf. *Jones* v. *City of Opelika,* 316 U. S. 584, dissenting opinion adopted *per curiam* on rehearing, 319 U. S. 103. Nor is this a situation where the proceeding before the administrative agency involves on its face overcoming an arbitrary and unreasonable presumption, cf. *Speiser* v. *Randall,* 357 U. S. 531; it does not appear that any presumption of any kind would be operative in any proceeding before the Board of Parole.

III

Section 8 of the Waterfront Commission Act does not conflict with the National Labor Relations Act.

Appellant contends that Section 8 is unconstitutional on the ground that it denies the right guaranteed by Section 7 of the National Labor Relations Act to employees "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing", and also on the ground that the subject matter of Section 8 has been pre-empted by the National Labor Relations Act.

Section 8, the statute in issue, is an important part of comprehensive legislation designed to deal with certain evil conditions in the port of New York which had been publicly exposed by various state and federal bodies and which were threatening the economic primacy of the port of New York and thereby the basic economic foundations of the States of New York and New Jersey. Accordingly, the question herein is whether Section 7 of the National Labor Relations Act confers an absolute and unqualified federal right upon waterfront workers in the port of New

York (denied by Section 8) to select even convicted felons as union officers and agents to the total exclusion of all considerations respecting the imperative need of the States of New York and New Jersey to deal remedially with a local police problem.

A. The Imperative Local Need—The Legislative Background of Section 8.

1. *General necessity for legislation to remedy the evil conditions found on the New York waterfront.*

The Waterfront Commission Act was born out of public indignation against racketeering and other evil conditions on the waterfront in the port of New York. For decades these evil conditions had been a source of grave public concern (*Report on Dock Employment in New York City and Recommendations for Its Regularization,* Mayor's Committee on Unemployment (1916); *Report of Joint Legislative Committee on Unemployment* (1932), New York State Leg. Doc. 69; *Report of the District Attorney, New York County* (1946-8), pp. 38-46; *Final Report to the Industrial Commissioner, State of New York, from Board of Inquiry on Longshore Industry* (1953); *Presentment by the Hudson County Grand Jury,* 1950 Term, 3rd Sess., *in the Superior Court of New Jersey* (1952)).

These evil conditions threatened the economic primacy of the port of New York and consequently were a matter of grave concern to the States of New York and New Jersey. The port of New York, with more than 650 miles of shoreline and facilities for the berthing of four hundred ocean-going ships at one time, is America's principal gateway and the most valuable natural asset of the States of New York and New Jersey. About 13 million people, more than one-fifteenth of the population of the United States, live within a 25 mile radius of the Statue of Liberty in metropolitan New York and northern New Jersey. It has

been estimated that the port of New York directly or indirectly provides economic support for one out of every four of these 13 million people *(The Port and The Community*, report of the Port of New York Authority, May, 1956).

In view of the seriousness of the evil conditions in the port of New York and the importance of the problem, the New York State Crime Commission and the Law Enforcement Council of the State of New Jersey joined forces in 1951 to investigate the waterfront. The Crime Commission alone heard more than 700 witnesses and held over 1,000 hearings in executive session. It then held 20 days of public hearings at which 188 witnesses were called and five volumes of testimony, totalling 3,895 pages, were recorded.

The Crime Commission concluded that the port of New York was losing its competitive position as a shipping center because of the criminal and other unhealthy conditions on the waterfront *(Fourth Report of the New York State Crime Commission*, New York State Leg. Doc. No. 70 (1953), pp. 7, 8, 9, 23-25).

The Crime Commission reported:

> "The evidence demonstrates that the Port of New York is in danger of losing the position of supremacy to which its natural advantage entitled it. If the Port should lose its rightful supremacy there will inevitably follow a crushing blow to the prosperity of City and State" (*id.* at 7),
>
> * * *
>
> "* * * existing conditions: [on the waterfront are] first, the unhealthy conditions in the steamship and stevedoring industry; second, the International Longshoremen's Association (ILA), its component locals, and the flagrant disregard by union officials of the welfare of their members; third, corrupt labor leaders engaging in incompatible business enterprises; fourth,

> the antiquated shape-up method of hiring dock workers and the forcing of undesirable hiring foremen on the employers; fifth, the public loading racket; sixth, the ineffectiveness of the present pier watchman system; * * *'' (*id.* at 10).

The Governor of the State of New York, upon receipt of the Crime Commission's published findings and recommendations, with which the New Jersey Law Enforcement Council agreed (*Report of the New Jersey Law Enforcement Council* (June 19, 1953)), held two days of public hearings thereon. The hearings were attended by leading members of the legislature of New York and of the New Jersey Law Enforcement Council (*Record of the Public Hearings Held by Gov. Thomas E. Dewey on the Recommendations of the New York State Crime Commission,* June 8 and 9, 1953).

The record of these public hearings before the Governor of New York, as well as the record of the hearings before the Crime Commission and the Crime Commission's report, were thereupon submitted to the legislatures of New York and New Jersey with the proposed Waterfront Commission Act. The Act was promptly passed in New Jersey and New York and approved by both Governors.

The Waterfront Commission Act embodies a series of remedial measures designed to eliminate the waterfront evils that had been publicly exposed. These measures, in addition to the provisions of Section 8, include the creation of a bi-state regulatory body, the Waterfront Commission of New York Harbor; the registration of longshoremen; the licensing of stevedores, pier superintendents, hiring agents, and port watchmen; the outlawing of "public loading"; the elimination of the "shape-up" method of hiring longshoremen by the establishment of employment information centers for the employment of longshoremen; and the regularization of employment of longshoremen through the elimination of excess casual labor from the longshoremen's register.

2. *The imperative local need to bar criminals from acting as waterfront union officers and agents in order to protect union funds and to eliminate criminal influence on the waterfront.*

The problem of criminal influence in waterfront unions was a matter of particular concern to the Crime Commission. Thus, the Crime Commission stated in its report as follows:

> "It was established that at least 30 per cent of the officials of the ILA longshore locals have police records. Waterfront criminals know that the control of the local is a prerequisite to conducting racket operations on the piers. Through their power as union officials, they place their confederates in key positions on the docks, shake down steamship and stevedoring companies by threats of work stoppages, operate the lucrative public loading business, and carry on such activities as pilferage, loansharking and gambling." (*Fourth Report*, pp. 23-24.)

The Crime Commission found that there was an urgent need, if the port of New York was to maintain its leading position as a port, for measures for the safeguarding of funds collected in the form of dues and assessments from the working population on the waterfront and for the elimination of criminal control of waterfront unions. The detailed findings of the Crime Commission concerning this problem are set forth in an Appendix to this brief and we respectfully submit that a reading of these findings is necessary to a full understanding of the nature and magnitude of the problem that confronted the States of New York and New Jersey and that was sought to be rectified by the enactment of Section 8.

With respect to those findings of the Crime Commission, Mr. Theodore Kiendl, Special Counsel of the Crime Com-

mission, stated as follows at the public hearings before the Governor of the State of New York:

> "The next and a very serious condition that the [Crime] Commission found was the tragic misuse and misapplication of union funds, bearing in mind that union funds only came from one source, the dues that were paid by the longshoremen working in the Port of New York. Instances of that were not innumerable, but there were a great many instances.
>
> "Then the Commission found and reported that there was amazing loss of the books and records of these unions. Time after time records that the Commission wanted to examine were unavailable, and the very significant excuse or justification was suggested that from time to time they had been stolen. Why these union books were susceptible of larceny and why anybody would want them did not appear, but it was perfectly apparent that the Commission's accountants were unable to examine and audit many of them." *(Record of the Public Hearings held by Gov. Thomas E. Dewey,* supra, p. 3).

3. *Congressional recognition of the local need to bar criminals from acting as waterfront union officers and agents.*

Congress, itself, had demonstrated grave concern over the evil conditions existing in the port of New York, particularly with respect to the problem of criminal control of waterfront unions. Thus, an Investigating Subcommittee of the Senate Committee on Interstate and Foreign Commerce, created on January 30, 1953 pursuant to Senate Resolution, conducted its own investigation of the New York waterfront and concluded that the port of New York had become a horrible example of the nation's waterfront ills. S. Rep. No. 653, 83d Cong., 1st Sess. (1953), p. 5. The report of the Senate Committee expressed concern, among other things, over the fact that criminal elements

were firmly entrenched on the waterfront, primarily through their grip on the organized labor movement, and that criminals with long records had been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Further, the Senate Committee took explicit cognizance of and "heartily" endorsed the objectives of the proposed legislation in New York and New Jersey to deal with these problems. The Senate Subcommittee thus reported as follows:

> "The Port of New York is not a fair sample of the Nation's waterfront ills. It has become, in recent years, a horrible example. The former Senate Crime Committee touched its racket-infested peripheries briefly in 1950. Other studies and investigations had sought to illuminate it—without notable success or lasting effects—intermittently through the last quarter century.
>
> "Three things have happened since 1950 to mark New York as the logical starting point for the present national study of waterfront conditions. First, the Federal Government's concern with this area has been intensified by a substantial increase in the flow of military and strategic materials to Europe and Africa through its shipping facilities. In 1952, the United States Government, in the person of its Army Corps of Engineers, was in effect driven out of the area. (This is the Claremont fiasco, for which the Nation's taxpayers are still entitled to a full accounting.) Second, a number of underworld figures who are prominent for their activities in organized crime, and who are still 'unfinished business' so far as Congress is concerned, seem clearly to have moved in on the New York waterfront when their other domains were restricted as a result of the prior Senate probe. And third, the local situation has been stoutly assaulted—to the extent that an agency of one State could reach it—by the New York State Crime Commission.

"The subcommittee was invited to round out the splendid accomplishments of Judge Proskauer and this commission by directing its attention to the interstate aspects of what had come to light on the New York side of the port, and by analyzing the problems of the various Federal agencies which Judge Proskauer could not examine within the scope of his inquiry. Again the New York Commission's cooperation and contributions are acknowledged; the subcommittee hopes it is returning in some measure the value it received from this commission and its hard-working staff." (S. Rep. No. 653, *supra*, pp. 5-6).

* * *

"Criminal elements and criminal activities are firmly entrenched on the waterfront, primarily through their grip on the organized labor movement. For many years it has been generally accepted that the place for an ex-convict to find employment is around the docks. This, standing alone, would not be objectionable; no doubt many men who have paid their debts to society have been able to make a new start in such employment. But in this instance the scales have tipped the other way: the waterfront is not where a man can 'go straight'—it is where he can keep crooked. Criminals whose long records belie any suggestion that they can be reformed have been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Under their regimes gambling, the narcotics traffic, loansharking, short-ganging, payroll 'phantoms,' the 'shakedown' in all its forms—and the brutal ultimate of murder—have flourished, often virtually unchecked." (*id.* at 7)

* * *

"The thugs, gangsters, and shabby politicians who have been exploiting the waterfront owe their immunity in part to the fact that they have been operating in and through legitimate components of the

organized labor movement. Memories of some of the excesses and outrages of the past, when employers came in for their share of well-merited attack, are still alive. This tends to explain why local law-enforcement agencies have been prone to avoid or ignore the waterfront, and why apparent rottenness within the ILA has been tolerated by employers and the community. Criticism, and attempted correction, have been stifled with charges of persecution and epithets such as 'labor baiter' and 'antiunion.'" (*id.* at 8)

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"When the New York State Crime Commission sought to investigate the financial affairs of ILA locals in the area, it found that nearly half of them had maintained no books and records, or that their books were missing. The commission also found that 30 percent of the union officials in the locals were men with criminal records. A number of indictments for extortion, coercion, and tax fraud have resulted from disclosures about the management of these locals." (*id.* at 14)

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"The subcommittee has been very favorably impressed with a plan, sponsored by the Port of New York Authority and other public and private agencies in the New York-New Jersey area, for bistate regulation to improve waterfront conditions. The Port Authority plan (which could also be applied unilaterally to the New York half of the port) proposes three basic controls: first, longshoremen, hiring agents and public loaders would be made subject to a licensing system, permitting reasonable tests of good moral character for the purpose of weeding out practicing racketeers, as well as continuous supervision through the power to suspend and revoke licenses; second, waterfront employment would be handled through publicly operated employment exchanges, to dispense with

the 'shape,' and otherwise to assure fair employment practices subject to the terms specified in current labor agreements; and third, public loader services and charges would be subjected to direct regulation, to insure that they are just, reasonable, nondiscriminatory and rendered only when requested. This plan may require modifications, and the subcommittee takes no position with respect to the merits of its details, for *its development is a local responsibility. But the ends it seeks to achieve are heartily endorsed. Congressional action will be necessary if an approach such as this is attempted on a bistate or interstate basis. The subcommittee endorses and applauds such constructive efforts as these, and will hold itself available to serve as the liaison body with Congress for the development of necessary implementing legislation at the Federal level.*" (*id.* at 49-50) (emphasis supplied).

Upon enactment of the Waterfront Commission Act in 1953 by New York and New Jersey, Part I of the Act, which embodied the Waterfront Commission Compact and which as an interstate compact required Congressional consent, was referred to the Senate Committee on Interstate and Foreign Commerce and the House Committee on the Judiciary. (Section 8 of the Waterfront Commission Act has the status of an independent state statute and as such did not require Congressional consent.)

Both Congressional committees recognized the imperative public need for local remedial legislation and recommended consent to the Compact. S. Rep. No. 583, 83d Cong., 1st Sess. (1953); H. Rep. No. 998, 83d Cong., 1st Sess. (1953). The House Committee in its report specifically recognized, under a section entitled "The Need For Legislation", the finding by the New York Crime Commission of unlawful appropriation and misapplication of union funds. H. Rep. No. 998, *supra*, p. 4.

During the hearing before the House Committee on the Judiciary, the General Counsel to the ILA, who testified

in objection to the Compact, made the following contention in a written statement:

> "Another provision of this far-reaching compact [sic] forbids any labor organization from collecting dues from waterfront workers if any of its officers or agents has ever been convicted of a felony. Contrary to the policy expressed in the Labor-Management Relations Act that workers shall be free to select their own bargaining agents, the States of New York and New Jersey have decided to take over that function from them, at least in part, and to tell the workers categorically that certain men shall be ineligible to serve them as the officers or agents of their choice. This provision is not generally applicable to all unions even within the two States but hits only at the ILA. A virtually identical piece of State legislation was declared unconstitutional by the United States Supreme Court as being in irreconcilable conflict with the Federal law (*Hill* v. *Florida*, 325 U. S. 538, 65 S. Ct. 1373)." *Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, on H. R. 6286, H. R. 6321, H. R. 6343 and S. 2383*, 83d Cong., 1st Sess. (1953), p. 136.

This contention is of course identical with the contention made by the appellant herein.

Additional statements explaining and supporting Section 8 of the Waterfront Commission Act were made to the House Committee by Governor Driscoll of New Jersey and Mrs. Elinore M. Herrick, representing the Commerce and Industry Association of New York, Inc. (*id.* at 47 and 108).

Finally, Congress, itself, formally recognized that the conditions on the New York waterfront were primarily a matter for local regulation. This is reflected in the unusual broad scope of its consent to the Waterfront Com-

mission Compact which consents to future, as well as present legislation, and which, moreover, does not reserve any federal jurisdiction with respect to regulation of interstate or foreign commerce. Thus, the Congressional consent to the Waterfront Commission Compact provides (67 Stat. 541):

> "The consent of Congress is hereby given to the compact set forth below, to all of its terms and provisions, and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."

In significant contrast, Congressional consent to the compact creating the Port of New York Authority specifically withholds any power which would conflict with federal rights or jurisdiction, as follows (42 Stat. 174, 180):

> "*Provided,* That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

B. Section 8 Does Not Conflict with Section 7 of the National Labor Relations Act.

Section 7 of the National Labor Relations Act provides that employees shall have the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."* Appellant's claim that Section 8 is unconstitutional as being in conflict with Section 7 of the National Labor Relations Act rests upon the premise that Section 7 vests in employees an absolute freedom to select even

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* The complaint herein is entirely devoid of any allegation that appellant participates in collective bargaining for Local 1346. Consequently, the right under Section 7 "to bargain collectively through representatives of their own choosing" would appear not to be involved in the instant case.

convicted felons as union officers or agents. In assessing appellant's claim, the local police need must be weighed against the extent of the claimed interference with federal rights.

Viewed most favorably from appellant's standpoint, the interference, if any, with rights of employees under Section 7 of the National Labor Relations Act is surely minimal, for there certainly is no great interest, insofar as the purposes and objectives of the National Labor Relations Act are concerned, in having convicted felons serve as union officers or agents. On the other hand, the imperative nature of the police problem confronting the states of New York and New Jersey—a need recognized by Congress itself—is conclusively documented in the legislative history of Section 8 of the Waterfront Commission Act set forth, *supra*, pp. 17-27 and in the Appendix to this brief. Consequently, it cannot be reasonably asserted, we respectfully submit, that Congress ever intended in enacting Section 7 of the National Labor Relations Act to prevent the states from exercising their traditional powers to cope with a local police problem of the most serious proportions in favor of a dubious claim of absolute freedom by employees to select even convicted felons as union officers or agents.

Moreover, under the principle laid down by this Court in *Kelly* v. *Washington*, 302 U. S. 1, 10, that "the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together,' " the validity of Section 8 of the Waterfront Commission Act is unquestionable. Indeed, in protecting the union dues and assessments contributed by waterfront employees for union organization and collective bargaining against the peculations of criminal elements, Section 8 is affirmatively consonant with the purposes and objectives of the National Labor Relations Act.

In support of his contention that Section 8 is unconstitutional, the appellant relies heavily on the decision by this Court in *Hill* v. *State of Florida*, 325 U. S. 538. There, a Florida statute required union business agents to be licensed by a state administrative body. The Florida statute broadly defined the term "business agent" to include union representatives engaged in collective bargaining. The statute provided that no person could receive a license as a union "business agent" unless he had been a citizen of the United States for more than ten years, had good moral character and had never been convicted of a felony. Consequently, the Florida statute prohibited collective bargaining unless the representatives were licensed and the grant of a license was discretionary with state officials. This, of course, constituted an outright attempt by Florida to regulate collective bargaining as such. As this Court stated in *Hill, supra*, at page 541:

> "Section 4 of the Florida Act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative."

Moreover, there was a significant failure in the *Hill* case of any showing by Florida of a pressing need for the exercise of its local police powers, in contradistinction to the compelling nature of the local police problem that led to the enactment of Section 8. Chief Justice Stone recognized this when he stated in his concurring opinion in the *Hill* case, at page 544:

> "This, of course, does not mean that labor unions or their officers are immune, in other respects, from the exercise of the state's police power to punish fraud, violence, or other forms of misconduct, either

> because of the commerce clause or the National Labor Relations Act. It is familiar ground that the commerce clause does not itself preclude a state from regulating those matters which, not being themselves interstate commerce, nevertheless affect the commerce, People of State of California v. Thompson, 313 U. S. 109, 113, 114, 116, 61 S. Ct. 930, 932, 933, 85 L. Ed. 1219, and cases cited; Parker v. Brown, 317 U. S. 341, 360, 63 S. Ct. 307, 318, 87 L. Ed. 315, and cases cited, and that the state's authority is curtailed only as Congress may by law prescribe in the exercise of the commerce power. United States v. Darby, 312 U. S. 100, 119, 657, 61 S. Ct. 451, 459, 85 L. Ed. 609, 132 A.L.R. 1430, and cases cited. I can find nothing in the National Labor Relations Act or its legislative history to suggest a Congressional purpose to withdraw the punishment of fraud or violence, or the violation of any state law otherwise valid, from the state's power merely because the state might subject the business agent of a labor union, who violates its law, to imprisonment, which would prevent his functioning as a bargaining agent for employees under the National Labor Relations Act. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740, 748, 62 S. Ct. 820, 825, 86 L. Ed. 1154. See S. Rep. No. 573, 74th Cong., 1st Sess.; H. Rep. No. 1147, 74th Cong., 1st Sess."

In this connection, we respectfully commend to this Court as being entirely persuasive the opinion herein by the Appellate Division of New York, wherein it was stated (5 A. D. 2d 603, 613; 174 N.Y.S. 2d 596, 605-606):

> "In the instant case the question as to pre-emption would not be whether Congress intended to exclude the State from directly dealing with the subject of the right to choose bargaining agents or union officials, but whether the Congress intended to go even further

and to exclude the State from indirectly limiting the right of choice so that the selection would be only from among those who had not been convicted of a felony.

"In our opinion there has not been such a pre-emption and, further, there is no conflict between the provisions of section 8 of the Waterfront Commission Act and section 7 of the National Labor Relations Act. We do not believe that the Congress intended to interfere with the right of States to deal with their special police problems with respect to the waterfront and to deal with them in the limited manner that the New York Legislature did in section 8. In International Longshoremen's Ass'n, Independent v. Hogan (3 Misc. 2d 893, 156 N.Y.S. 2d 512, supra) the same question was directly at issue and the same conclusion was reached. Similar arguments for avoidance of section 8 were made in the second Linehan case (116 F. Supp. 683, supra), in Staten Island Loaders (117 F. Supp. 308, supra), in Bradley (130 F. Supp. 303, supra) and in Hazelton v. Murray (21 N. J. 115, 121 A. 2d 1). The arguments were there rejected.

"Hill v. State of Florida (325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782) is readily distinguishable. In that case the subject Florida statute, F.S.A. § 447.01 et seq., required labor unions and their business agents to be licensed by a certain administrative agency of the State. Although the statute prohibited the issuance of a business agent's license to anyone who had been convicted of a felony, it also contained other prohibitions against issuing such licenses and also certain regulations generally subjecting applicants for a license to the task of satisfying the administrative agency that they were entitled to the licenses according to certain standards. The action was by the Attorney General of Florida to enjoin a labor union and its business agent from operating, on the ground that they had not procured licenses. The Attorney

> General did not claim that the business agent had been convicted of a felony. As pointed out in International Longshoremen's Ass'n, Independent v. Hogan (supra, 3 Misc. 2d at page 896, 156 N.Y.S. 2d at page 515), Florida's statute sought 'to regulate collective bargaining by licensing persons who wished to act as business agents' and 'Florida did not argue that it was confronted with any special police problem other than regulating collective bargaining, while in the instant case the New York State Crime Commission clearly demonstrates a need for police power legislation directed not at collective bargaining, but at the protection of union funds'."

Hence, the Florida statute involved in *Hill* is in no wise comparable to Section 8 of the Waterfront Commission Act and the considerations that obtained in *Hill* are entirely dissimilar to those in the instant case. Further, the impressive unanimity with which the validity of Section 8 has been sustained by both the Supreme Court of New Jersey in *Hazelton* v. *Murray*, 21 N. J. 115 (1956), and the Court of Appeals of the State of New York, the court below, warrants, we respectfully submit, the consideration of this Court.

Moreover, Section 504 of the recently enacted Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519) (hereinafter called the "Disclosure Act", which prohibits any person convicted of certain crimes from serving, *inter alia*, as an officer or employee of a union for a period of five years following his conviction unless, *inter alia*, the Board of Parole of the United States Department of Justice determines that such person's service as a union officer or employee would not be contrary to the purposes of the Disclosure Act, vitiates the claim of the appellant of an absolute freedom of employees to select even convicted felons as union officers or agents. Hence, whatever incidental interference Section 8 of the Water-

front Commission Act may have had with the freedom of choice claimed by appellant has been so substantially reduced that only those persons convicted of felonies other than those enumerated in Section 504 of the Disclosure Act and of felony convictions more than 5 years old, are now affected by Section 8 of the Waterfront Commission Act. Therefore, in view of the Disclosure Act, there is no reasonable basis whatever for asserting that Section 8 constitutes such an undue interference with federal rights under Section 7 of the National Labor Relations Act as to be unconstitutional. Indeed, in the Disclosure Act, which embodies the criminal prohibitions of Section 504, Congress finds and declares in Section 2 that "the enactment of this Act is necessary to eliminate or prevent improper practices . . . which distort and defeat the policies of the Labor-Management Relations Act, 1947, as amended." Hence, Congress, itself, stated in effect in the Disclosure Act that this type of legislation (prohibition of criminals from holding union office) is affirmatively consonant with the purposes and objectives of the National Labor Relations Act.

Further, the Disclosure Act contains various amendments to the National Labor Relations Act designated as such by Congress (Title V, § 505; Title VII, §§ 701-707). The criminal prohibitions of Section 504 of the Disclosure Act, however, are not set forth as constituting an amendment to the National Labor Relations Act. In fact, the legislative history of the Disclosure Act discloses a specific Congressional intent not to legislate in the area covered by the National Labor Relations Act (except, of course, those provisions explicitly passed as amendments to the National Labor Relations Act) *Hearings Before Subcommittee on Labor of the Senate Committee on Labor and Public Welfare* on S. 505, S. 748, S. 76, S. 1002, S. 1137 and S. 1311, 86th Cong., 1st Sess. (1959), page 110; S. Rep. No. 187, 86th Cong., 1st Sess. (1959), pages 5, 84. This conclusively shows that Congress in enacting anti-corruption

legislation did not consider that it was legislating in an area covered by the National Labor Relations Act and did not consider, therefore, that it was interfering with any rights conferred by the National Labor Relations Act.

Finally, the remaining contention of appellant that the subject-matter of Section 8 has been entirely pre-empted by the National Labor Relations Act is without substance in view of the repeated holdings by this Court that in the area of labor relations federal legislation has not so pre-empted the field as to preclude an otherwise valid exercise of the state police power. *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*, 315 U. S. 740; *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U. S. 485; *United Construction Workers, etc.* v. *Laburnum Construction Corp.*, 347 U. S. 656; *International Union* v. *Wisconsin Employment Relations Board, et al.*, 336 U. S. 245; cf. *Thomas* v. *Collins*, 323 U. S. 516.

IV

Appellant's claim that Section 8 of the Waterfront Commission Act has been pre-empted by the Disclosure Act is not properly before this Court since it was not raised below. In any event, there is no pre-emption because the Disclosure Act explicitly provides that it does not reduce or limit responsibilities under a State law such as Section 8.

A. Appellant's Claim That Section 8 of the Waterfront Commission Act Has Been Pre-empted by the Disclosure Act Is Not Properly Before This Court Since It Was Not Raised Below.

Appellant in his brief asserts that Section 8 of the Waterfront Commission Act conflicts with Section 504(a) of the Disclosure Act and apparently therefore Section 8 has been pre-empted by Section 504(a). Since the Disclosure Act was not enacted until September 14, 1959, after

the decision herein by the New York Court of Appeals, the court below, this claim of unconstitutionality was not of course asserted in the courts below. Further, of course, the complaint herein is entirely silent respecting the Disclosure Act.

Withal, appellant now urges upon this Court a claimed pre-emption of Section 8 by Section 504 of the Disclosure Act. Appellant now asks this Court to consider any and all constitutional objections to Section 8 of the Waterfront Commission Act that appellant may now conjure entirely apart from the actual judgment being appealed to this Court from the New York courts.

But the fact of course is that under Section 1257(2) of Title 28, U.S.C., pursuant to which this appeal is taken, this Court has only jurisdiction to review "[f]inal judgments or decrees" of state courts. Appellants claim that Section 8 has been pre-empted by the Disclosure Act was not and, in fact, could not have been raised below; therefore, such claim is not in any way involved in or affected by the judgment upon appeal herein.

Under the established rule of this Court that it will not consider a question that was not raised below in the state courts but instead is asserted for the first time in this Court, *McGoldrick* v. *Compagnie Generale Trans Atlantique*, 309 U. S. 430, appellant's claim that Section 8 has been pre-empted by Section 504 of the Disclosure Act is not properly before this Court. Further, it is clear that the judgment herein is not *res judicata* of appellant's claim of pre-emption by virtue of the Disclosure Act. Restatement, Judgments, § 70 (1942).

This Court's decision in *State Farm Mutual Automobile Insurance Co.* v. *Duel*, 324 U. S. 154, is controlling here. There, the Supreme Court of Wisconsin had sustained the denial of a renewal license to an Illinois automobile insurance company against the contentions of the insurance company that the Wisconsin licensing statute was uncon-

stitutional under the due process and full faith and credit clauses of the Constitution. After an appeal had been taken to this Court by the insurance company, this Court rendered its decision in *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533, holding that the fire insurance business was commerce within the meaning of the interestate commerce clause of the Constitution. Accordingly, in the *State Farm* case, the Illinois automobile insurance company then urged upon this Court that the Wisconsin licensing statute was also unconstitutional under the interstate commerce clause. Since, however, this claim was not made in the Wisconsin state courts, this Court refused to consider the contention. Further, since it was not shown that the judgment appealed from in *State Farm* was *res judicata* with respect to the claim of unconstitutionality predicated upon the interstate commerce clause, this Court affirmed rather than vacated the judgment of the Supreme Court of Wisconsin. Accordingly, appellant's claim that Section 8 is unconstitutional because it has been pre-empted by Section 504 of the Disclosure Act may not be raised in this Court since it was not asserted in the New York courts and the judgment herein should be affirmed.

Finally, it is not inconsistent in any respect to consider appellant's claim of a conflict between Section 8 and Section 7 of the National Labor Relations Act, as it has been modified by the Disclosure Act, *supra*, pp. 32-34, and not to consider appellant's claim of pre-emption by the Disclosure Act as such. For appellant's constitutional claim under Section 7 of the National Labor Relations Act is properly before this Court and of course this claim must be considered as it presently exists, that is, in the light of its diminution by the Disclosure Act. However, appellant's claim of preemption under the Disclosure Act is not before this Court at all.

B. Section 8 Is Not Pre-empted by the Disclosure Act Because the Disclosure Act Explicitly Provides That It Does Not Reduce or Limit Responsibilities Under a State Law Such as Section 8.

The Disclosure Act evinces on its face an acute Congressional concern with, and a deliberate awareness of, the question of federal pre-emption. In fact, this Congressional concern pervades the entire Disclosure Act, for the question of federal pre-emption is explicitly dealt with at several places in the Disclosure Act, itself. In order to understand the scope and operation of these provisions of the Disclosure Act explicitly dealing with pre-emption, a brief review of the Act is necessary.

Title I of the Disclosure Act (§§101-105), entitled *Bill of Rights of Members of Labor Organizations,* vests certain rights in union members, *e.g.,* the equal right to vote in union elections and participate in union affairs (§101(a)(1)); the right of freedom of speech and assembly as a union member (§101(a)(2)); the right against increases in dues and initiation fees and levying of assessments except upon majority vote (§101(a)(3)); the right to sue as a union member (§101(a)(4)); the right against improper disciplinary action by the union (§101(a)(5)); the right to copies of collective bargaining agreements (§104); the right to be informed by the union of the provisions of the Disclosure Act (§105); and the right to sue in federal district court to enforce the rights created by Title I (§102). Respecting the question of pre-emption in connection with Title I, Section 103 of Title I provides:

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

Title II of the Disclosure Act (§§201-210), entitled *Reporting by Labor Organizations, Officers and Employees*

of Labor Organizations, and Employers, requires that reports be filed with the Secretary of Labor by labor organizations concerning their constitution, bylaws and internal proceedures (§201(a)(1)) and concerning their financial operations and condition (§201(b)(1)); by union officers and employees concerning transactions that may create a conflict of interest (§202); by employers concerning any payments to unions or union officers and agents and concerning payments made to interfere with or persuade employees in the exercise of their rights to organize and bargain collectively or payments made to obtain information concerning the activities of employees or of the union in a labor dispute (§203(a)); and by any person concerning payments made by him pursuant to any agreement with an employer to persuade employees in the exercise of their rights to organize and bargain collectively or payments made to obtain information regarding the activities of employees or of the union in a labor dispute and also concerning such agreement with any employer (§203(b)). Such reports are made public information (§205); records on matters required to be reported must be kept for at least five years (§206); and the Secretary of Labor is empowered to issue rules and regulations respecting such reports (§208) and to maintain suit in federal district court to enforce the provisions of Title II (§210). Respecting the question of pre-emption in connection with Title II, Section 205 (c) of Title II provides:

> "No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency."

Hence, by explicit provision, the reporting requirements of Title II make the reporting requirements of state law

inoperative only to the extent that the same information is supplied to the State in the form of a copy of the report filed with the Secretary of Labor.

Title III (§§ 301-306), entitled *Trusteeships*, requires a union which has a trusteeship over a subordinate union to file certain reports with the Secretary of Labor (§ 301); provides that trusteeships shall be administered only in accordance with the constitution and bylaws of the superior union and for certain specified purposes or for otherwise carrying out the legitimate objects of the superior union (§ 302); makes it unlawful in any election of officers of the superior union to count the votes of the union in trusteeship or to transfer, with certain exceptions, to the superior union any funds of the union in trusteeship (§ 303); and any member of the superior union or the union in trusteeship, itself, and the Secretary of Labor, upon complaint of such union members or unions, may maintain suit in federal district court in the event of violations of Title III for such relief as may be appropriate (§ 304). The provisions of Title II respecting reports required to be filed under Title II are made generally applicable to the reports of trusteeship required to be filed under Title III, including the provisions of Section 205(c), *supra*, making the requirements of state law inoperative only to the extent that the same information is supplied to the state in the form of a copy of the report filed with the Secretary of Labor (§ 301(b)). Further, with respect to pre-emption, Section 306 of Title III provides:

> "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: Provided, That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be res judicata."

Title IV (§§ 401-404), entitled *Elections*, requires that elections of union officers be held by secret ballot with a

prescribed minimum frequency (§ 401(a)(b)(d)), prescribes certain requirements concerning the distribution of candidates' campaign literature and concerning access to union's membership lists (§ 401(c)); regulates the conduct of elections (§ 401(e)); empowers the Secretary of Labor, upon application of any union member, to remove after hearing an elected union officer guilty of serious misconduct upon a finding that the union's removal procedure is inadequate (§ 401(h)); and empowers the Secretary of Labor, upon complaint of a union member, to maintain suit in federal district court to set aside an election the result of which has been affected by violations of Section 401 (§ 402). Respecting pre-emption and the application of other laws, Section 403 of Title IV provides:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

Hence, the provisions of Title IV concerning elections are made exclusive, excepting, however, existing rights and remedies to enforce the union's constitution and bylaws with respect to elections prior to the conduct thereof.

Title V (§§ 501-505), entitled *Safeguards For Labor Organizations*, imposes certain fiduciary responsibilities upon union officers or agents and provides for suit in federal district court in certain circumstances by any union member to enforce such fiduciary responsibilities (§ 501); requires union officers or agents who handle funds or property to be bonded in certain specified amounts (§ 502); prohibits any union from lending money to its

officer or employee which would result in a total indebtedness by such officer or employee in excess of $2,000 and prohibits any union from paying the fine of any officer or employee convicted of wilful violation of the Disclosure Act (§ 503); embodies the provisions of Section 504, *supra*, prohibiting any person, and any union from permitting such person, from holding a union office or job who has been convicted of certain specified crimes for five years after such conviction unless such disability is removed by the Board of Parole of the Department of Justice; and embodies certain amendments to Section 302 of the National Labor Relations Act (§ 505).

Title VI (§§ 601-611), entitled *Miscellaneous Provisions*, contains, as its title indicates, various miscellaneous provisions, most of which are of general applicability to the preceding provisions of the Act, such as service of process (§ 605), the applicability of the Administrative Procedure Act (§ 606), etc. The provisions of Title VII are described by its title, *Amendments to the Labor Management Relations Act, 1947, as Amended.*

Unlike Titles I through IV, Title V of the Disclosure Act contains no provisions with respect to the question of federal pre-emption. However, Sections 603(a) and 604 of Title VI provide as follows:

> "Sec. 603. (a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.
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> * * *

> "Sec. 604. Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes."

Congress in the Disclosure Act has thus dealt thoroughly and painstakingly with the question of federal pre-emption. Where Congress has wished to occupy an area exclusively, it has done so by explicit provision. The areas in which Congress has explicitly provided in the Disclosure Act for pre-emption concern union elections (§ 403, *supra*) and union trusteeships (§ 306, *supra*). Significantly, these are areas where regulation by more than one authority would necessarily result in mutual incompatibility, *e.g.*, the conduct of an election can hardly be governed by more than one set of requirements and the need for the exclusivity of the federal court's jurisdiction over a union trusteeship under the Disclosure Act is evident.

Even in these areas, however, Congress carefully and specifically limited the extent of federal pre-emption and, moreover, was even divided over the necessity of federal pre-emption at all. Thus, with respect to elections, Congress limited the exclusivity of the Disclosure Act by providing in Section 403, *supra*, that "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title." Notwithstanding this reservation of state rights, the minority report of the Senate Committee on Labor and Public Welfare objected that state remedies respecting a union election which has already been conducted should likewise not be pre-empted because "many State laws provide more expeditious and effective remedies in the area than does

the committee bill" (S. Rep. No. 187, *supra*, p. 101). The majority report of the Senate Committee took the position, however, that "There is great need for uniformity in the laws governing union elections" and that "It would be confusing, unduly burdensome, and often impossible for them [the unions] to comply with a variety of election laws" (S. Rep. No. 187, *supra*, pp. 21, 22).

And in the area of union trusteeships, while the federal court's jurisdiction over a trusteeship in an action under the Disclosure Act by the Secretary of Labor is made exclusive, Section 306, *supra*, provides that "the rights and remedies provided by the title shall be in addition to any and other rights and remedies at law or in equity." As stated by the committee reports, "Individual union members will therefore have a choice between suing in the State courts under the common law or invoking the provisions of the Federal statute" (S. Rep. No. 187, *supra*, p. 19; H. Rep. No. 741, 86th Congress, 1st Sess., (1959) p. 15). This reservation of state law was adopted over the objection of A. J. Bielmiller, Director of Department of Legislation of the AFL-CIO, before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, that it would subject international unions to the varying laws of 49 states and would lead to practical difficulties (Hearings Before Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *supra*, p. 72).

Accordingly, the net result of the various specific provisions in the Disclosure Act respecting federal pre-emption is only a limited pre-emption of state law in the area of union elections and a provision for the exclusivity of a federal court's union trusteeship in an action by the Secretary of Labor. Clearly, therefore, Congress, in exercising its powers of federal pre-emption in the Disclosure Act has acted circumspectly, indeed reluctantly and only in the most necessitous circumstances. A Congressional intent to pre-empt the field in the Disclosure Act is accordingly not to be lightly inferred and, therefore, there

is no warrant for inferring that Congress intended the felony prohibitions of Section 504(a) to pre-empt the field.

Congress, however, has not left the question to inference and indeed has explicitly provided to the contrary. Section 603, *supra*, expressly states that "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization—under the laws of any State." These provisions were characterized by the House Committee on Education and Labor as stating the matter "unequivocally," as indeed they do (H. Rep. No. 741, *supra*, p. 25). Section 603 is thus unequivocally applicable to the responsibility under Section 8, the state law, of a person (covered by the language "other representative of a labor organization" of Section 603) not to collect dues for a waterfront union having an officer or agent who has been convicted of a felony unless such person has been pardoned or has received a certificate of good conduct.

Section 603 was adopted by Congress only after a complete airing of the problem. The question of federal preemption was discussed by numerous witnesses in the Congressional hearings (Hearings Before Subcommittee on Labor of Senate Committee on Labor and Public Welfare, *supra*, pp. 72, 115, 135, 136, 180, 226, 227, 463, 580, 581, 765; Hearings Before Joint Subcommittee of the House Committee on Education and Labor on H. R. 3540, H. R. 3302, H. R. 4473 and H. R. 4474, 86th Cong., 1st Sess., (1959), pp. 7, 11, 18, 98, 122, 263, 292, 294, 352, 353, 355, 356, 862, 1242, 1307). Several witnesses opposed a general retention of state rights comparable to the provisions of Section 603. George Meany, the president of the AFL-CIO, who, in his testimony before the Congressional committees stated that the Waterfront Commission had played a large part in the elimination of evil conditions in the port of New York (Hearings Before Joint Subcommittee of the House Committee on Education and Labor, *supra*, pp. 137, 138), opposed in other testimony a general retention of

state rights as contained in Section 603 on the ground that this would result in conflict and duplication and would unfairly burden the unions (Hearings Before Joint Subcommittee of the House Committee on Education and Labor, *supra*, p. 263). Arthur Goldberg, Esq., who appeared as special counsel to the AFL-CIO, also opposed a general retention of state rights comparable to the provisions of Section 603. He testified: "I think the states should not be permitted to make illegal what this Congress, after full consideration, decides should be permitted" because this would result in multiplicity, duplicity and conflict (Hearings Before Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, *supra*, p. 581). These objections are identical, of course, to appellant's objections to Section 8 in the instant case. Notwithstanding these objections by important witnesses, Congress enacted Section 603 providing for a general retention of state rights. Consequently, Section 603 was adopted by Congress after full deliberation and constitutes its considered judgment that state law should be retained in absence of explicit provision in the Disclosure Act to the contrary.

Indeed, even apart from Section 603, Section 8 of the Waterfront Commission Act could not be said to have been pre-empted by Section 504(a) of the Disclosure Act since "the [claimed] repugnance or conflict is [not] so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' ". *Kelly* v. *Washington*, *supra*, p. 10. Section 504(a) in no respect constitutes such a comprehensive regulation of, for example, a business enterprise so as to make regulation by more than one authority inherently incompatible; accordingly, there is no reason whatever why Section 8 should not be effective concurrently with Section 504(a).

In fact, the reasons for the enactment of Section 8 remain just as vital today as before enactment of the Disclosure Act. The plan of Section 8 is that a convicted felon may not serve as an officer or agent of a waterfront union

unless, in substance, the local state officials find that it is appropriate for him to become an officer or agent of a waterfront union in the port of New York. The local officials are, of course, the persons most conversant with the New York waterfront. They are the most knowledgeable concerning the current problems of the port of New York and the history and present activities of waterfront criminal elements and their associates. Thus, the local state officials charged with the responsibility are in the best position to determine whether it would be compatible with the purposes and objectives of the Waterfront Commission Act for a particular felon to become eligible to serve as an officer or agent of a waterfront union in the port. Accordingly, Section 8 retains its vitality as an important part of legislation enacted by the States of New York and New Jersey for the purpose of eliminating evil conditions in the port of New York.

V

Section 8 of the Waterfront Commission Act does not violate the due process requirement or the *ex post facto* or bill of attainder prohibitions of the Constitution.

A. The Prohibition of Section 8 of the Waterfront Commission Act Against Ex-felons from Acting in Key Union Positions Is Reasonable and Does Not Violate Due Process.

The necessity to protect waterfront employment in the Port of New York District and the funds of waterfront unions from criminal control and domination has heretofore been documented in detail, *supra*, pp. 17-27 and Appendix herein. Having reasonably found that many waterfront union positions were occupied by corruptive criminal elements, it cannot be contended that the Legislatures of New York and New Jersey were arbitrary or unreasonable in determining that the public interest required that water-

front union funds be protected from criminal elements by making it unlawful for anyone to collect dues on behalf of a waterfront union which has ex-felons as officers and agents. The felony disqualification of Section 8 of the Waterfront Commission Act is by no means unique. It has been continually recognized by the legislature as a satisfactory test with respect to qualifications for other occupations and the exercise of certain rights. For example, the following New York statutes provide that a felony conviction disqualifies a person from engaging in certain occupations or exercising certain rights.

Alcoholic Beverage Control Law, §126	Traffic in Alcoholic Beverages
Banking Law, § 369	Check Cashers
Education Law, §§ 6502	Physicians
6613(12)	Dentists (forfeiture)
6702	Veterinarians
7011(8)	Podiatrists (forfeiture)
Election Law, § 152	Suffrage
General Business Law, §§ 74	Private Investigators and
81	Employees
Public Health Law, § 3450 (4)	Funeral Directors, and Undertakers (forfeiture)
Real Property Law, § 440-a	Real Estate Brokers

This Court has heretofore upheld the right of a state legislature in regulating an area of legitimate local concern to generally exclude from an occupation or employment any person who has been convicted of a felony. *Hawker* v. *New York*, 170 U. S. 189. In the *Hawker* case, the New York statute involved was Section 153 of the Public Health Law which declared it a misdemeanor for any person convicted of a felony to practice medicine. No provision was made in that statute, as is contained in Section 8 of the Waterfront Commission Act, for removal of the prohibition by way of obtaining a pardon from the Governor or

by way of receipt of a certificate of good-conduct from the proper local authorities. Nor was any provision made for the removal of the disqualification by lapse of time. Nevertheless this Court upheld the reasonableness of that statute even though it was an absolute disqualification, stating, at 195, 196:

> "Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. 'The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.' *Dent* v. *West Virginia, supra,* p. 122.
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> "It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? . . ."

With respect to the contention that the general prohibition for the protection of the community works hardship in individual cases, this Court specifically said, at 197:

> "It is no answer to say that this test of character [felony conviction] is not in all cases absolutely cer-

tain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law one convicted of crime was incompetent as a witness, and this rule was in no manner affected by the lapse of time since the commission of the offense and could not be set aside by proof of a complete reformation. So in many States a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage . . ."

"In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established."

And, with respect to the reasonableness of the felony disqualification, this Court, taking cognizance of similar statutes in other jurisdictions (p. 191, footnote 1) stated, at 193:

"But if a State may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test."

The controlling considerations in the *Hawker* case continue to serve as the bases for decisions of this Court in

upholding state legislative requirements in other areas of legitimate local concern. E.g., *Adler* v. *Board of Education*, 342 U. S. 485 (subversive organization membership disqualified persons from being faculty members or school superintendents, New York Educational Law, Sections 3021, 3022); *State of Ohio* v. *Deckebach*, 274 U. S. 392 (Cincinnati ordinance prohibited the issuance to aliens of a license for operating pool and billiard rooms). As stated by this Court in the *Deckebach* case, *supra*, at 397:

> "It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. Ft. Smith Light & Traction Co. v. Board of Improvement, 274 U. S. 387, 47 S. Ct. 595, 71 L. Ed. 1112, decided this day.
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> "Some latitude must be allowed for the legislative appraisement of local conditions (Patsone v. Pennsylvania, supra, 144 [34 S. Ct. 281]; Adams v. Milwaukee, 228 U. S. 572, 583, 33 S. Ct. 610, 57 L. Ed. 971), and for the legislative choice of methods for controlling an apprehended evil. *It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods.*" (Emphasis supplied.)

Regarding the contention in appellant's brief that the legislature has failed to recognize "man's right to redeem himself," (p. 27) this is entirely repudiated by the provisions of Section 8 itself, which immediately remove the ineligibility of an ex-felon upon his receipt of a pardon or a certificate of good conduct. It should be noted that the statutes listed above (with the exception of Section 152 of the New York Election Law) make no provision for

removal of a felony conviction ineligibility. Nor is any such provision essential to due process. *Hawker* v. *U. S. supra.* In view of Section 8's provision for removing a felony conviction disqualification, its reasonableness is, *a fortiori*, conclusive.

Finally, it is urged that the means provided by Section 8 for removing appellant's disqualification are inadequate. Of course, since no means whatever need be provided for removing his disqualification, this contention is entirely irrelevant. *Hawker* v. *U. S., supra.* Further, this contention should be disregarded in view of appellant's failure to ever avail himself of the relief afforded him by Section 8. *Supra*, pp. 14-15.

The fact that appellant may not be afforded a hearing when applying for a certificate of good conduct does not necessarily violate the due process requirements of the Constitution. *Escoe* v. *Zerbst*, 295 U. S. 490; *Reetz* v. *Michigan*, 188 U. S. 505. And, even if there were no judicial review of a denial of a certificate of good conduct as there is none for the Governor's refusal to grant a pardon, this would not be violative of constitutional due process requirements. *Reetz* v. *Michigan, supra; National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37. However, the allegation that the Board of Parole's refusal to grant a certificate of good conduct is not subject to judicial review is conspicuously made without the citation of any authority.

While only the Governor may grant a pardon, the power to grant a certificate of good conduct has been vested by the Legislature in the Board of Parole. New York Executive Law, Section 242.3. The policy governing the granting of a certificate of good conduct by the Board of Parole is set forth in the Governor's memorandum urging enactment of Section 242.3:

> "Presently, in addition to the stigma attached to those who have committed felonies and certain mis-

demeanors, there is the disability to engage in various licensed occupations. A convicted felon is also deprived of the right to vote. All of these disabilities may be removed in only one way, namely, by exercise of the Governor's constitutional power of executive clemency.

"A large number of such convicted persons start life anew upon release from prison and build a new, law-abiding life as a useful citizen. It does not seem just that one who has reestablished himself in the community should carry these added handicaps through his whole life, except for the rarely exercised power of clemency. Accordingly, in my annual message to the Legislature I recommended that the Board of Parole be given the power by unanimous vote of its three members to grant certificates to persons convicted of felony if, after release, they have reestablished themselves in the community, for a sufficient period of time. The effect of the certificate would be to remove such specified disability as in the absolute discretion of the Board of Parole was merited.

* * *

"These bills will give vitality to the principle that a man who is worthy to be let out of prison should have at least the opportunity of eventually obtaining all of the privileges and responsibilities of full citizenship." (McK. Executive Law, § 242, Historical Note.)

Thus, if appellant's conduct since his conviction is as exemplary as he claims it to be in this proceeding, an application by appellant to the Board of Parole should warrant the most favorable consideration.

While the courts might be reluctant to interfere with the valid exercise of the Board of Parole's discretion in denying a certificate of good conduct, no statutory provision prohibits judicial review of the exercise of this discretion pursuant to Section 242.3 of the Executive Law.

(See New York Civil Practice Act, Sections 1283, 1284 (1)(2), 1285 and 1296(1) concerning judicial review of decisions of state agencies.) In any event until the Board of Parole has acted and until the New York State courts determine the validity of such action, this Court should not in the instant proceeding determine the adequacy of the Board's procedures, *supra*, pp. 14-16. Similarly, the conclusions based upon communications of the Board of Parole, as set forth in the brief of the New York Civil Liberties Union, at the most are purely speculative. See *Garner* v. *Board of Public Works*, 341 U. S. 716, 724.

B. The Constitutional Provisions Against *Ex Post Facto* Laws and Bills of Attainder Do Not Apply to Section 8 of the Waterfront Commision Act.

The decision of this Court in *Hawker* v. *People of New York, supra*, is a complete answer to the objection that Section 8 of the Waterfront Commission Act violates Article I, Section 10 of the United States Constitution. As heretofore noted, the New York statute, declared to be valid in that case, made no provision for removal of the felony conviction ineligibility and the ineligibility maintained irrespective of when the crime may have been committed. This Court is respectfully referred to that decision in which cognizance is taken of several statutes containing similar provisions as to the effect of a felony conviction. The opinion of this Court in the *Hawker* case, is, at the least, equally applicable in vitiating appellant's contention. Moreover the *Hawker* case has been cited with approval in *Garner* v. *Board of Public Works, supra*, 722, 735 and in *Trop* v. *Dulles*, 356 U. S. 86, 95, in which this Court, setting forth the test as to what is non-penal, stated:

> "This Court has been called upon to decide whether or not various statutes were penal ever since 1798. Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder

and *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of t ower to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

In view of the substantial evidence of exploitation of waterfront union funds by criminal elements in the port of New York district, it is clear "that the evident purpose of the legislature" in enacting Section 8 was to protect union funds and members from gangster control. The claim that this is a bill of attainder or *ex post facto* law because the legislature intended to additionally punish any particular individual should be rejected by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals of the State of New York should be affirmed.

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January, 1960.

APPENDIX

Fourth Report of the New York State Crime Commission

NEW YORK STATE LEGISLATIVE DOCUMENT
No. 70 (1953), pp. 19-32.

II

THE ILA AND ITS COMPONENT LOCALS HAVE FLAGRANTLY DISREGARDED THE WELFARE OF THEIR MEMBERS AND THE PUBLIC

One of the most distressing conditions disclosed at the public hearing was the exploitation and betrayal of the rank and file dock worker by his ILA officials and representatives.

The International Longshoremen's Association is affiliated with the American Federation of Labor. The jurisdiction of the ILA is defined in Article III of its Constitution as follows:

> "The jurisdiction of the I.L.A. shall include the work herein enumerated in the United States and its possessions, in Canada, in Central and South America. It shall include all work done directly and indirectly in connection with loading and unloading operations of all floating structures in such territory, including the trades and occupations directly and indirectly associated with such operations, whether they be conducted on docks, piers, marine warehouses, or on board vessels; * * *"

Responsibility for the operation of the ILA rests in the hands of its president, Joseph P. Ryan. Ryan, and the other officers of the International, compose the Executive Council. The president and Executive Council presumably are accountable for their actions to the ILA Con-

vention, which is held every four years unless a special convention is called (3628-3630).

The International and about 64 active ILA locals have offices in the Port of New York. Twenty-seven locals are in Manhattan, 22 in Brooklyn, 4 in Staten Island and 11 in New Jersey (3629). The members of these locals are engaged in such diverse activities on the waterfront as longshore work, checking, carpentry, platform work and public loading.

This section of the report devoted to the ILA and its Port of New York locals, will be divided into (1) the operations of the ILA, and (2) the operations of the ILA locals in the Port of New York.

A. The Operations of the ILA

The primary functions of the International are: (i) negotiating collective bargaining agreements; (ii) organizing employees into the ILA; and (iii) supervising and assisting the ILA locals.

(*1*) *The ILA Has Failed in its Obligations as the Bargaining Agent of the Dock Workers*

Labor contract negotiations are conducted between the ILA and the New York Shipping Association (NYSA). The NYSA is a trade association representing most of the steamship and stevedoring companies, and other employers of waterfront labor in the Port.

The ILA is represented in labor contract negotiations by its president, assisted by delegates from the ILA locals concerned. They constitute the Wage Scale Conference, a body so large and unwieldy that it is impractical for all its members to participate in actual negotiation with NYSA representatives.

There have been constant criticisms that the delegates to the Wage Scale Conference have been handpicked by

Ryan and his supporters, and that the dock workers have never been given an effective voice in the negotiations. The very existence of widespread accusations made by longshoremen that Ryan and his associates are not primarily motivated by interest in the welfare of the rank and file, is a fact to be taken into account.

This dissatisfaction on the part of many longshoremen has precipitated numerous wildcat strikes. Thus in October 1951, after the results of the voting on a wage contract were announced, a very expensive wildcat strike occurred. There was evidence of fraud in connection with this ratification vote in some of the locals (Exs. 362, 363).

Even though over the years the hourly rate has risen, there has been no marked improvement in the average yearly earnings of the individual longshoremen (Ex. 575).

(*2*) *Ryan and Many ILA Organizers Are Demonstrably Unfit for Their Posts*

In addition to accepting Christmas and other payments, Ryan also admitted receiving monies from stevedoring and steamship companies and others which he deposited in the ILA Journal Account and characterized as donations to an "anti-Communist" fund (3718-3721).

From this ILA Journal Account Ryan withdrew $31,651 in cash and expended by checks $460 for a cruise to Guatemala, over $1,000 for golf club dues and charges, $10,000 for premiums on his personal insurance, and $817 for such luxury items as expensive shirts and high-priced shoes (Ex. 600).

To summarize, during the period January 1, 1947 to September 30, 1952, Ryan took out of ILA funds more than $240,000, of which $115,000 was salary, the remainder being made up of the amounts referred to above and expense allowances which included $12,494 to buy Cadillac automobiles (Ex. 602).

Ryan testified that when he used ILA funds for his own needs he, in effect, offset these amounts by using cash from his own personal bank account for anti-Communist purposes. The Commission accountants, however, could find no records which support Ryan's contentions in this regard, and Ryan himself conceded that he had kept improper accounts (3729). Ryan has recently been indicted for misuse of union funds.

The responsibility for organizing falls under the jurisdiction of Ryan and the organizers working under him. Ryan has the power to employ and discharge these organizers and to fix their salaries. There are approximately seven ILA organizers in the Port. Most of them hold other union positions from which they also draw salaries and expense allowances. These Ryan assistants wield extraordinary power over the life of the dock worker.

Our conclusion as to the unfitness of these organizers is based on the evidence. We specify:

(a) Edward J. McGrath, an organizer from 1936 until his resignation in 1951, has a criminal record showing 12 arrests for crimes ranging from petty larceny to murder and including two convictions for burglary (Ex. 398). He has never been a working longshoreman, yet Ryan appointed him an organizer less than a year after his release from Sing Sing Prison. McGrath and his brother-in-law, John (Cockeye) Dunn, were the kingpins of rackets on the lower West Side piers and bosses of the ILA Platform Workers Union. Dunn and Andrew (Squint) Sheridan, both former ILA officials, were electrocuted for the waterfront murder of hiring foreman Anthony Hintz.

McGrath refused to answer 115 questions on the ground of self-incrimination, and explained his refusal by reading a statement to the effect that he had been characterized in the press as a "criminal, racketeer and gangster" (2869). He was then asked (2870):

BY MR. KIENDL:

Q. Now, Mr. McGrath, I would like to ask you one question. Are you, in fact, a racketeer, criminal or gangster? A. I refuse to answer on the grounds that my answer might tend to incriminate me.

(b) Harold Bowers was appointed by Ryan as an ILA organizer for the North River area in July, 1951. Bowers, alias Frank Donald, has been arrested on four occasions charged with such offenses as robbery, possession of a gun, grand larceny (twice) and congregating with known criminals (Ex. 45). Bowers still continues both as a paid organizer and as financial secretary of Local 824, for which he receives an annual income of $15,000. He admitted that he has no idea of how to be a financial secretary (2230). Dominick Genova, a former member of Local 824, testified that Harold Bowers was a member of the gang in control of the upper North River piers headed by Harold's cousin, Michael (Mickey) Bowers, a convicted bank robber (2153-2154).

(c) Alex DiBrizzi, alias Al Britton, was appointed an organizer by Ryan in 1946. DiBrizzi has been arrested fifteen times and convicted three times for gambling violations, and has been convicted once for violation of the alcohol laws. He has also been arrested on charges of grand larceny, felonious assault and disorderly conduct (Ex. 62). DiBrizzi took the position that although he was president of ILA Local 920, he felt no personal responsibility for the maintenance of union books and records, or for the funds of the union (1914-1922).

(d) Ryan appointed Edward J. Florio an ILA organizer in 1948. Florio had already served a year in a Federal penitentiary for conspiracy to operate a still (Ex. 13). His recent return to a Federal penitentiary grew out of a confession of perjury in connection with the receipt of money

from a stevedoring company already referred to. Florio has also received close to $25,000 since 1948 from a loading concession on the Hoboken piers without doing a stroke of work.

(e) Ryan designated Costantino (Gus) Scannavino as an ILA organizer to succeed Emil Camarda, who was shot and killed in 1942. Scannavino, a brother-in-law of notorious Vincent Mangano, is an admitted associate of Albert Anastasia and of Gioacchino (Dandy Jack) Parisi (1590-1591.) Scannavino, since 1947, has accepted over $9,500 in gifts from steamship, stevedoring and dock companies (Exs. 207, 357).

(f) Ryan appointed his niece's husband, Joseph J. Schultz, as an organizer in or about 1948. Ryan admitted that Schultz performed no services as an organizer but was his personal assistant. Schultz was also placed in the lucrative position of solicitor for advertisements in the ILA Journal. His 25 per cent commission on all advertisements, sold mostly to steamship and stevedoring companies, amounted to over $26,000 for the period 1949-1952 (3661-3666). This was sheer graft.

(3) *The ILA Has Failed to Supervise its Locals*

The ILA official hierarchy has done nothing to protect the members of the ILA locals. With very few, if any, exceptions, control of the locals in this Port has fallen into the hands of leaders whose primary concern is for their own selfish interests. No attempt has been made to insure democratic procedures or financial responsibilities. Though the ILA has proclaimed the principle of local autonomy, it has permitted exploitation of the locals in complete disregard of the basic philosophy of union democracy.

For years the ILA has been aware of the many abuses which exist in the methods of electing and selecting officers

of the locals. Thus, six Brooklyn locals known as the "Camarda Locals" were for at least ten years under the control of a group of notorious criminals headed by Albert Anastasia, Vincent Mangano and their two lieutenants, Gioacchino (Dandy Jack) Parisi and Anthony (Tony Spring) Romeo.

Anthony P. Giustra, financial secretary of one of these locals, described Romeo's extortion of thousands of dollars from the union treasury during the 1930-1940 decade (1570-1571, 1573):

> Q. And did you have a talk with Romeo when he took over that local? A. No, sir. He came over to me and he told me, "I'm the boss here."
>
> • • •
>
> Q. What did you say to him? A. What could I say. I was scared to death. I wanted to quit. He said, "No, you stay here." That's what he told me about it.
>
> • • •
>
> Q. And did he demand money from the treasury of that local? A. Always.
>
> Q. And what would he do? Would he come to you and ask you for the money? A. Yes, sir.
>
> Q. You had the money, didn't you, as financial secretary? A. When the money comes in from the dues, he used to take it away. • • • Maybe it runs about $20,000, something like that.

Albert Anastasia and Dandy Jack Parisi were frequently seen in the union offices at 33 President Street, Brooklyn, associating with union officers (1529, 1641). The so-called City Democratic Club, located in South Brooklyn, was a hangout for racketeers where many officials of the "Camarda Locals" were either active members or frequent visitors (1519-1526).

In April, 1940, William O'Dwyer, the then newly elected District Attorney of Kings County, conducted an investigation of the Brooklyn locals in the course of which he obtained evidence of grand larceny and embezzlement of union funds and the forgery and destruction of union books. Soon after receiving the files of the then existing Amen Investigation on May 15, 1940, O'Dwyer closed his investigation of waterfront rackets (1558-1560). No prosecutions resulted (1551).

In June 1940, O'Dwyer invited Ryan and Emil Camarda, one of the ILA vice-presidents, to a conference in which the facts uncovered by the investigation were disclosed. Ryan announced that a drastic reformation would be carried out, and that he would revoke the charters of Locals 920, 903, and 346, three of the "Camarda Locals" (1551-1552). These charters were revoked, but new charters were issued to the same individuals who were in control of the old locals—a change of numbers and that was all.

Even today these locals continue under the domination of the same officers who have controlled them for many years (Ex. 303).

The ILA has never exercised its constitutional authority to supervise or reform its locals even where scandal reached major proportions.

B. The ILA Locals, Their Control and Administration

In this section will be discussed the control of the locals and waterfront areas by criminal elements, the financial irresponsibility of officers of the locals, the undemocratic procedures followed in many of the locals, and the existence of an overabundance of locals to the detriment of their members.

Appendix

(1) Known Criminals Are in Control of Important ILA Locals and of Key Waterfront Areas

It was established that at least 30 per cent of the officials of the ILA longshore locals have police records. Waterfront criminals know that the control of the local is a prerequisite to conducting racket operations on the piers. Through their power as union officials, they place their confederates in key positions on the docks, shake down steamship and stevedoring companies by threats of work stoppages, operate the lucrative public loading business, and carry on such activities as pilferage, loansharking and gambling. We specify:

(a) Operations in the area of the New York waterfront from Pier 84 to Pier 97 North River are largely controlled by the following group (2150-2183):

1. Michael (Mickey) Bowers

Convicted of bank robbery and sentenced to ten years in New Jersey State Prison. Arrested three times for grand larceny and on charges of assault and robbery, robbery and violation of parole (Ex. 47).

2. John (Keefie) Keefe

Arrested for bank robbery and convicted on a charge of assault with intent to kill and sentenced to 12 years in New Jersey State Prison. He has also been arrested on charges of assault on two occasions, and for possession of a gun (Ex. 46).

3. Joseph (Apples) Applegate, alias Lawson

Convicted of burglary and sentenced to 2½ to 10 years in Sing Sing Prison. He has been arrested on charges of robbery, grand larceny twice, and as a material witness for homicide (Ex. 141).

4. Harold Bowers, alias Frank Donald

Arrested twice for grand larceny, for robbery, for possession of a gun and congregating with known criminals (Ex. 45).

5. John T. Ward, alias Harold Ward, alias Charles Roggers

Arrested for carrying a concealed weapon, and on a charge for vagrancy (Ex. 48).

After the Bowers group took over Local 824, "The Pistol Local," John Keefe was made vice-president and Harold Bowers business agent. Local 824 has been used by the Bowers group to place persons with serious criminal records in hiring foreman positions and other key spots on the piers. Dominick Genova, a former member of this local testified to various illegal activities conducted by the Bowers group (2143-2179). Genova's own life was threatened when he refused to murder a person as a favor for Joseph (Apples) Applegate. The intended victim, one Vincent Wice, was murdered shortly thereafter (2180-2183).

(b) Control of operations in the section on the North River below the Bowers domain, was taken over by Edward J. McGrath and his brother-in-law, John (Cockeye) Dunn, with the assistance of Andrew (Squint) Sheridan, Thomas (Teddy) Gleason, and Cornelius (Connie) Noonan. This group also organized the platform workers into ILA Local 1730, of which Gleason and Noonan are still officers. Daniel Gentile, who at various times worked for the group, described in detail gambling operations and other illegal activities which were operated from the offices of Local 1730 (2478-2512). McGrath, Gleason and Noonan refused on constitutional grounds to answer any questions concerning these operations.

(c) The East River longshoremen are dominated by Michael (Mike) Clemente, the "boss" of ILA Local 856. Vincent G. Carpenter, an officer of the Davie Transport Company, Inc., paid Clemente a total of $7,000 to allow the Davie Company to do its own loading. A further payment of $500 to Clemente was made "as a gratuity for not having any trouble or interruption of service in discharging and delivering cargo" during the wildcat strike of 1951 (221-235). Clemente is presently under indictment for extortion and for falsifying a statement to the U. S. Treasury.

(d) In Brooklyn, the operation of the six "Camarda Locals" by Albert Anastasia and his confederates has already been noted. Many of Anastasia's intimate associates continue to hold key union positions in these locals. One brother, Gerardo (Jerry) Anastasio, business agent of Local 338-1, according to the testimony of Captain Phineas Blanchard, president of Turner & Blanchard Stevedoring Company, demanded to be placed on the company's payroll to insure "no trouble" with the union (284-286).

(e) The New Jersey side of the Port has been the scene of violence and gang warfare. The Jersey City docks have been dominated by Vincent (Barney Cockeye) Brown, Anthony (Tony Cheese) Marchitto, and the late Frank (Biffo) DeLorenzo. All have been leaders in a struggle for control of Local 1247, public loading concessions, and the hiring of dock workers. Commission testimony concerning the bombing of Local 1247 headquarters in 1951 has led to a series of indictments in New Jersey (1013-1506).

In Hoboken, six locals were tightly held by Edward J. Florio, ILA boss in New Jersey until recently. Florio, in association with the Commissioner of Police and three union officials, dominated all the Hoboken docks. Workers seeking employment were compelled, as a prerequisite to job assignment, to get the consent of Florio or one of his associates (751-1013).

There is a constant struggle for jurisdictional control over various areas in the Port by individual leaders or would-be leaders in the locals. This necessarily involves personalities. However, the names of the personalities involved are not particularly significant, since the participants in this fight for power are constantly shifting. The unfortunate conditions continue today substantially as they have existed for the past thirty years.

(2) Criminal Control of ILA Locals and Waterfront Areas Produce Crime. Serious Instances of Extortion Were Established

Elsewhere in this report particular crimes attributable to gangster-union control have been described. The evidence at the public hearing also disclosed shocking instances of extortion. As examples:

(a) The importers of a $2,000,000 cargo of furs were forced to pay over $70,000 to ILA officials to secure delivery of their merchandise (658-698). Pasquale (Pat) Ferrone, a delegate of Local 1478-2, is now under indictment on charges of extortion as a result of these disclosures.

(b) The importers of a perishable shipment of lemons were compelled to pay almost $10,000 to get the lemons off Pier F, Jersey City (504-542).

(c) On another occasion shipper's agents paid $45,000 in cash to a "representative" in Jersey City to be allowed to secure delivery of a cargo of deteriorating tulip bulbs (785-850).

In each of these cases wildcat strikes were used as leverage to exact the tribute. When the payments were made the goods were moved.

(3) The Financial Affairs of Most of the Locals Have Been Loosely and Irresponsibly Conducted, Funds Have Been Misused and Records Have Been Destroyed

Many officials of ILA locals have been guilty of flagrant infidelity in administering the financial affairs of their locals. Financial records are often so badly kept and financial procedures and safeguards are so inadequate as to justify suspicions of misappropriation of union funds. In some instances, there was evidence indicating actual misappropriation. Financial reports are seldom rendered, and substantial expenditures of union funds have been made without membership authorization.

(a) A shortage of union funds in Local 1199 was revealed in the testimony of Anthony V. Camarda, the local's financial secretary (1637-1638):

> Q. Now, according to an exhibit that has just been received in evidence, there was shortage in funds in your local union of $3,281.42 on the first day of January of this year. Have you been asked about that? A. Yes, sir.
>
> Q. You can't account for it, can you? A. No, sir.

Anthony V. Camarda has recently been indicted in Kings County for grand larceny of union funds.

(b) Costantino (Gus) Scannavino, ILA vice-president and organizer, testified concerning salary payments made during the past three years to his nephew Michael Cosenza, business agent of ILA Local 327-1, who performed no services whatsoever for the local during the period (1596-1597):

> Q. He's (Cosenza) been in Arizona for three years, hasn't he? A. Yes.
>
> Q. And has he continued to be a business agent of that local? A. He is the business agent of that local.

* * *

Q. He hasn't performed any service for the local in the last three years, has he? A. That's right.

Q. And he has been getting $75 a week and expenses for three years without doing any work for that local? A. The local can answer what they send that money for.

Q. But you know, though, they do send him the money? A. Of course.

(c) The officers of Local 920, representing Staten Island's longshoremen, made large expenditures for their own benefit. Five hundred dollars was allotted by the membership to Alex DiBrizzi, president of the local, from union funds when he attended an ILA district convention in New York City in 1951. Four other delegates from Local 920 got like amounts. The money went for dinners, night clubs, liquor and other entertainment. Franklin, financial secretary, admitted paying an additional unauthorized expense incurred by DiBrizzi at the convention (1883):

Q. • • • Mr. DiBrizzi got five hundred dollars expenses but he spent a whole lot more, didn't he? A. Maybe he did.

Q. • • • As a matter of fact, he spent $937.40 more than his $500, didn't he? A. Yes, he got a bill for that from the Commodore Hotel.

• • •

Q. And you paid the Commodore with union funds. A. That's right.

Franklin paid DiBrizzi's son $300 out of union funds for alleged services performed in connection with the wildcat strike in the fall of 1951. Questioned as to whether such payment was authorized by the local's membership, Franklin replied (1876):

"No, they weren't authorized, that's true. It was an emergency expense."

These expenditures were all made while this local was operating at a deficit (1886).

(d) Many financial records have been mysteriously "lost," "stolen" or "misplaced"; some after the Commission's waterfront investigation had begun. More than half of the 45 ILA locals subpoenaed by the Commission failed to produce a complete set of books and records for the past five-year period on the claim that they had been lost or stolen. A typical example is that of Local 338, whose financial secretary, Joseph (Red) Mangiameli, testified (1870):

> Q. A lot of your books and records are missing, aren't they? A. Yes, sir.
>
> Q. Every book and record of that local prior to October 18, 1951, is missing, isn't it? A. Prior to what?
>
> Q. October 18, 1951. A. Yes, sir.

(e) Salvatore Camarda, financial secretary of Local 327, testified that all the financial books and records of his local for the period 1947 to 1950 were missing. His only explanation was "We moved so many times they must have got lost" (1623-1624).

(f) John (Ike) Gannon, financial secretary of Locals 824-1 and 901-1, had similar difficulties keeping track of union books and records (1991-1992):

> Q. What about the books and records of that union, 824-1? A. That was something I can't account for.
>
> Q. You mean by that they're gone? A. That's right. I'd much rather have those books here.
>
> • • •
>
> Q. They're not available? A. I can't find them.

In February, 1953, after completion of the public hearing testimony, the Commission was advised that certain union records were stored on Gannon's property in Westchester County. Members of the New York City Water Supply Police reported that they had seen these records, but they again disappeared before the Commission was able to inspect or get them into its custody.

(g) The "Pistol Local" (Local 824) had a particularly difficult time safeguarding its books and records. On at least two occasions the books were reported stolen from the local's offices. The last "theft" of the records occurred on the very day the Commission served a subpoena calling for their production (2212-2224).

The circumstances surrounding these and other missing records lead to an inescapable inference that the officials concerned feared the consequences of an audit by the Commission.

(h) Of the 34 ILA locals whose financial records were examined by Commission accountants, those of only 11 were found to be in reasonably good accounting form. A particularly shocking example of financial irresponsibility was disclosed by Charles P. Spencer, financial secretary of Local 866, who testified (1965-1967):

> Q. Did you keep any disbursements books? A. No, sir.
>
> Q. Did you keep any record of any expenditures that were made? A. No, sir.
>
> Q. Did you keep any record of any receipts that you took in? A. No, sir.
>
> Q. Did you keep any daily records of receipts of dues from its members? A. No, sir.
>
> • • •
>
> Q. As a matter of fact, Mr. Spencer, to be brutally frank about it, what you did with the money of that

union that was left over after paying expenses was to put it in your own pocket, isn't that right? A. That's right.

(i) John Beecher, financial secretary of Local 955, Brooklyn, admitted keeping no financial records from 1940 until July, 1952, although there were 200 dues-paying members (1672):

Q. So, we haven't any books, financial records of this union that you have produced from 1940 to 1952? A. No, sir.

Q. Was there any? A. No, sir.

(j) Joseph B. Franklin, financial secretary of Staten Island Local 920, testified that Alex DiBrizzi, president of the local, would turn over to Franklin the balance of the dues he had collected from the members without accounting for receipts and disbursements. This is Franklin's explanation of what he did with the funds received from DiBrizzi (1868):

Q. And Mr. DiBrizzi on Saturdays sometimes would hand you quite a roll of bills, would he not? A. Yes, he would sometimes.

Q. And you would take those bills home and put them in a jar? A. In a sort of novelty jar. I learned to discontinue that.

Franklin further testified that the local's financial records prior to 1951 were missing (1862).

(k) In many cases the financial secretary makes no report of any kind on finances to the membership. Even where some sort of report is made, it is usually in a form that gives little information to the members (1824, 1942, 1968). Some ILA locals have never employed any accountant to audit their books, and in most instances where there

have been audits, the indications are clear that the examinations were superficial and perfunctory (1618, 1924, 1997).

(1) Seven out of the 34 locals whose books were examined by the Commission had no bank accounts whatsoever prior to March 1952. A number of officials admitted the mingling of union moneys with their personal funds. Thus, Patrick (Packy) Connolly, next to Ryan in command of the ILA and president of Local 824 and its former financial secretary, testified (2349-2351):

> Q. Now, in connection with one of your important duties, that of collecting dues, what did you do with the money you collected while you were financial secretary? A. Well, the local never had a bank account when I went in there.
>
> • • •
>
> Q. But at all times, you, as a financial secretary, never deposited the excess when it existed in any bank? A. Oh, yes, it was deposited in my own bank, if I had it.
>
> Q. You mean you put it in your own funds? A. In my own account, if there was extra money there.
>
> Q. You mingled these moneys of the union with your own, is that what you mean, Mr. Connolly? A. Yes, sir, when I went in there, there was no bank account in the local.

(4) Undemocratic Procedures Have Helped to Keep Unscrupulous Labor Leaders in Power

Many ILA locals have never employed democratic procedures in conducting their internal affairs. The officers exercise a free hand in running their locals. A virtually disenfranchised membership has been unable to participate effectively in the conduct of union business.

Union members, as a general rule, are not adequately notified of union meetings. The usual procedure is for union officers to announce meetings through circulars and throwaways distributed on the piers.

(a) Often scheduled meetings never materialize because the number of members attending is insufficient to constitute a quorum. Salvatore Camarda, financial secretary of Local 327, testified (1627):

> Q. Now, how many meetings has Local 327 had in the last three years? A. We have been having a meeting every quarter and most of the time we haven't got a quorum and only the officers show up and we can't have any.
>
> Q. Only the officers show up? A. Yes, because they get paid every month. They surely show up.
>
> • • •
>
> Q. So that how many meetings have you actually been able to hold then in the past three years . . .? A. About three or four.

(b) Union elections are in many cases mere formalities which result in the continuance of the incumbents in office by unanimous motion. Anthony V. Camarda, who succeeded his father as financial secretary of Local 1199 upon the latter's death, testified to the use of this procedure in his local (1639):

> Q. Well, isn't it a fact that the officers are retained by motion every four years? A. Yes, sir.

(c) An especially flagrant case of "election by motion" occurred in Local 338-1 in 1949. Anthony P. Giustra, longtime financial secretary of the local, testified that Gerardo (Jerry) Anastasio had been defeated in an election for business agent. In that election two business agents were

to be elected, and Anastasio received the third highest number of votes in a field of four candidates. Less than a month later a special meeting was called at which a motion was made and passed that Anastasio be employed as a third business agent for the local (1585-1586).

(d) Patrick (Packy) Connolly, ILA executive vice-president and president of Local 824, the "Pistol Local", controlled by the Bowers mob, said there had not been a contested election in that local for 20 years (2358):

> Q. Has there ever been a contested election at any meeting of 824, that you know of? A. Yes, sir.
>
> Q. When? A. I think when Gannon first went in, the election was contested.
>
> Q. That was how many years ago? A. Oh, about twenty years ago I'd say.
>
> Q. Now, you say there was a contested election twenty years ago. Has there been any since? A. Not to my knowledge.

(e) Salvatore Camarda, financial secretary of Local 327, testified concerning the elections of officers of that local for the past ten years (1627-1628):

> Q. And at each of these four meetings were you and your nephew (Joseph Camarda) and Frank Russo voted into office? A. Yes, sir.
>
> Q. Were there ever any dissenting votes? A. Any what?
>
> Q. Any dissenting votes. A. What's that?
>
> Q. Did anybody vote against you? A. No, sir.
>
> Q. It was always unanimous, everybody voted for you? A. That's right.

(f) Some ILA locals do not even go through the motions of holding elections. A Hoboken longshoreman, Anthony DeVincenzo, stated that Hoboken ILA Local 881,

of which he was a member, has not held an election in 30 years (764). Local 901-1 has not held an election in 15 years or held a meeting in 10 years (1972).

(g) Some well-knit family groups have acquired domination of certain locals, the salaried positions being treated as a matter of inheritance. The Camardas have controlled certain Brooklyn ILA Locals for more than 25 years. Local 338, Brooklyn, has for years been the family preserve of Salvatore Mangiameli and his three sons. Brothers Joseph and John Mangiameli, financial secretary and business agent respectively, each receive out of union funds between $125 and $145 a week in salary and expenses, plus $10,000 life insurance coverage. In addition, the local borrowed money to provide each brother with a 1952 automobile (1609-1621).

(h) An example of what may happen to a rank-and-file member who has the temerity to object to a lack of union democracy was given by Mario Frullano of ILA Maintenance Local 1277. Frullano testified to an incident involving Paul Crissali, the business agent of that local (1825-1826):

> Q. Tell us what the argument was about. A. Well, I happened to see the business agent on the pier, and I went over to him. I wanted to find out why we were being charged $3 a month and weren't getting any benefits from it.
>
> Q. That is what you told him? A. Yes, sir.
>
> * * *
>
> Q. That is all you remember? A. No, I remember that I got in an argument with him and two other men. I don't know who they were, but they were down there with him, and the first thing you know, I got kicked by someone. I don't know who it was, but I know I was arguing with him.

Q. You got kicked in the groin? A. Yes, sir.
Q. And badly hurt? A. Yes, sir.
Q. You went to the hospital? A. Yes, sir.

Frullano also stated that during the four years he has been a member of Local 1277, he was notified of only one meeting and never received any reports concerning the local's finances (1824).

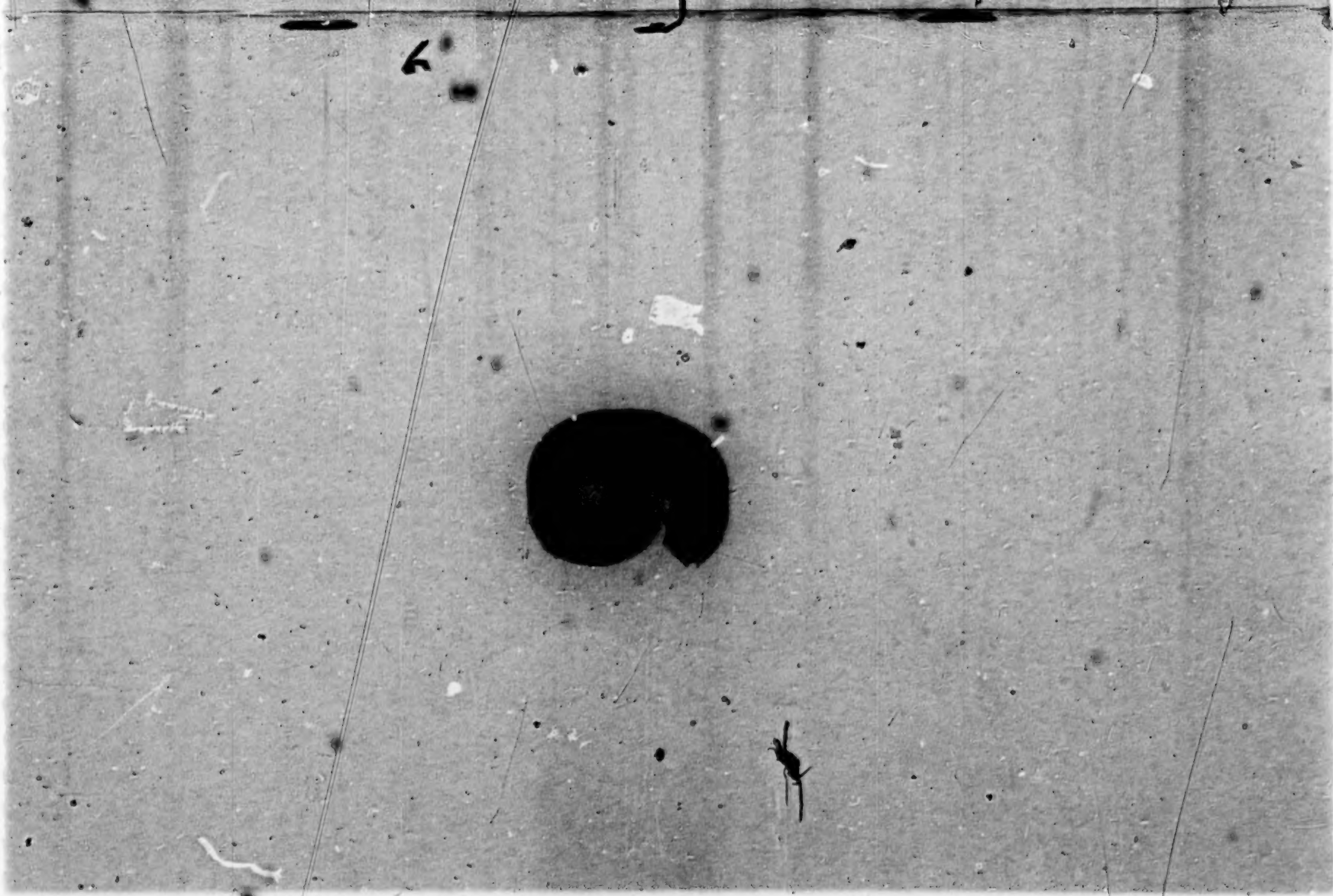
(5) Creation of Unnecessary Locals Is Used to Perpetuate Unfit Leaders in Power and Constitutes a Drain on Dues Paid by the Longshoremen

One of the methods used by the ILA hierarchy to perpetuate itself in power is the granting of ILA local charters to its own officers. Four such locals are actually inactive; yet the vote for each is cast at conventions and other union conferences.

Certain high-ranking officers of the ILA have been given control over a number of locals. A close personal friend of Ryan, John J. (Ike) Gannon, is the president of the New York District Council, ILA, vice-president of the Atlantic Coast District, ILA, and is secretary-treasurer of Locals 824-1 and 901-1. He was an organizer and now is a salaried "adviser" of the port watchmen's union. Another of Ryan's close personal friends, Charles P. Spencer, is secretary of the Atlantic Coast District, president of Local 901-1, secretary-treasurer and business agent of Local 866, and a salaried "adviser" of the port watchmen's union.

There is no possible justification for the continuation of the large number of ILA locals now in the Port of New York. The existence of unnecessary locals imposes a heavy financial burden on rank-and-file dock workers, since most locals have a minimum of two business agents and a financial secretary at weekly salaries of at least $75 plus $25

for so-called expenses. Many locals also purchase cars for their officers. The six Brooklyn "Camarda Locals" are an example of this needless duplication. These locals have their headquarters in the same neighborhood. The interests of their members, aggregating around 3,500, are identical and could easily and more efficiently be taken care of by one local.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 71

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR., as District Attorney of Richmond County,

Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLEE'S BRIEF

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—against—

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APPELLEE'S BRIEF

The Questions Presented by This Appeal

There are but three (3) questions properly presented by the appellant on this appeal, these are the questions set forth by the appellant in his jurisdictional statement at pages 4 and 5. They are as follows:

(1) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Article 6, Clause 2, in

that it is repugnant to the laws of the United States, specifically U. S. Code 29, Section 151, *et seq.*, better known as the National Labor Relations Act, as amended, said act, by reason of Section 157, having preempted Section 8 of the said Waterfront Commission Act.

(2) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Amendment 14, Section 1, in that it deprives appellant of his right to work at his chosen profession without notice or hearing of any kind.

(3) Whether Section 8 of the Waterfront Commission Act (Laws of 1953, Chapter 882, as amended) violates the Constitution of the United States, Article 1, Section 10, Clause 1, in that it imposes punishment for an offense committed prior to its passage and further that it subjects appellant to punishment without a trial.

Summary of Argument

I. Section 8 of the Waterfront Commission Act does not conflict with the National Labor Relations Act. The legislative history of the enactment of the Waterfront Commission Act by the States of New York and New Jersey gave ample proof of an immediate and present danger to the safety and welfare of the people of these states that was peculiarly local in character. Any conflict existing between Section 8 of the Waterfront Commission Act and Section 7 of the National Labor Relations Act is not so direct and positive that the two acts cannot be reconciled or consistently stand together.

Further, there is a long, unbroken line of cases in both State and Federal courts upholding the validity and constitutionality of the many regulatory provisions of the Waterfront Commission Act.

The case of *Hill* v. *Florida*, 325 U. S. 538, is readily distinguishable in that the Florida legislation involved sought to directly control through licensing collective bargaining agents, whereas Section 8 forbids the employment by labor unions of convicted felons based upon the unquestioned showing before many hearings of the domination of waterfront labor unions by such felons to the detriment of those employed on the waterfront and the citizens of the States of New York and New Jersey.

Congress specifically recognized the existence of this local condition and the enactment of Section 8 of the Waterfront Commission Act to cope with it when it approved the Waterfront Commission Compact. Such approval was given in spite of the argument of preemption made by this appeal.

II. The claim made by the appellants for the first time in their brief on appeal as to a conflict between Section 8 and the Labor-Management Reporting and Disclosure Act of 1959 is not properly before the Court since it was not passed upon by the Court below.

Even if such argument were before the Court, there is no basis to the claim of conflict since the Disclosure Act specifically safeguards the rights of States to act for the benefit of union members.

III. The enactment of Section 8 is a valid and proper exercise of the police powers of the State of New York. In view of the unquestioned findings made prior to its enactment that waterfront labor unions were controlled and dominated by criminals and ex-felons, such action is not arbitrary or capricious and the standards applied are reasonable and proper in view of the situation demonstrated to have existed in the Port of New York.

A State may disqualify persons who have previous criminal convictions from holding certain occupations provided

the exclusion is reasonable to the end sought to be attained and to eliminate the evil shown to exist.

Since Section 8 is designed primarily to safeguard union members and the general public from the evils shown to be inherent in convict dominated labor unions, it is not primarily penal in nature and hence cannot be construed as either an *ex post* facto law or a bill of attainder. It is prospective in nature and does not simply increase punishment for a past transgression.

ARGUMENT

POINT I

There is no conflict between Section 8 of the Waterfront Commission Act and any congressional action in the field of labor legislation.

It has long been recognized that our federal system of government gives rise to many delicate problems affecting the balance and relationships between our national government and the individual states. The national government must be concerned with matters affecting the nation as a whole or a substantial portion of it. The states can be concerned only with matters occuring within their own borders. Under many circumstances, situations exist in one or two states that cause grave concern and pose dangers to those states. These conditions however, are not sufficiently widespread to merit attention by the federal government. The question is then posed, "Is the individual state helpless to protect itself and its citizens from these dangers, solely because the danger lies in an area which is to some extent subject to federal legislation?" In *Kelly* v. *Washington*, 302 U. S. 1 (1937), at page 10, this Court said:

"There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulations and occupy only a limited field. When it does so, state regulations outside the limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police powers, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'."

A) No Enactment by Congress in the Field of Labor-Management Relations Has Eliminated State Action in the Exercise of Its Police Powers.

It is contended by the appellants that the bare language of Section 7 of the National Labor Relations Act as amended (29 U. S. Code, Section 157), which gives employees the right to organize into unions and to bargain with representatives of their own choosing and to take concerted action for the purpose of collective bargaining, forbids a state from attempting to correct a local condition whereby hoodlums, racketeers, and ex-felons had obtained dominant position in vital labor unions affecting waterfront commerce. That the state has power to regulate labor unions with a view to protecting the public interests is hardly to be doubted. Labor unions cannot claim special immunity from regulations. *Thomas* v. *Collins*, 323 U. S. 516, 532 (1944).

This Court has repeatedly held that the enactment of labor legislation by the Congress, did not *per se* prohibit the states from exercising legislative functions in this field. In *Allen Bradley* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1942), this Court held that federal legislation in the field was not designed to preclude a state

from enacting legislation prohibiting or regulating certain types of employee or union activity. The theory that Congress had preempted the field of Labor-Management Relations was rejected in that case by this Court in its opinion at page 749:

> "Furthermore, this Court has long insisted that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested'."

Recognition of the states rights to regulate various phases of labor relations over which they have traditionally exercised control, was granted by this Court in *Auto Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245 (1949). In that case it was held that Congress does not see fit in either the Wagner Act or the Taft-Hartley Act to declare either a general policy or specific rules setting forth the areas remaining for the states. This case held that Congress must clearly manifest an intent to exclude the states from legislating concerning a particular matter before the state statute will be stricken down. The theory that the bare language of Section 7 immunized labor unions from state legislation was expressly considered and rejected by the Court.

Again in *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953), the Court pointed out:

> "The National Labor-Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of Congressional will the area in which state action is still permissible." (Page 488)

It is obvious therefore, that there is no automatic prohibition against the states from legislating in the area of

labor-management relations. The problem presented is to determine the areas left open by Congress from the conflicting indications. In *Garner* v. *Teamsters Union, supra,* in the course of deciding these conflicting indications this Court has laid down several rules or yardsticks. A state statute affecting labor-management relations will not be stricken down as un-Constitutional where there is no existing or possible conflict or overlapping between the authority of the federal labor board and a state. *Auto Workers* v. *Wisconsin Employment Relations Board, supra.* It cannot be said that Section 8 of the Waterfront Commission Act causes any conflict between the authority of the National Labor Relations Board and the states of New York or New Jersey. Section 8 has nothing to do with recognizing the right of a labor union to bargain on behalf of employees. It is true that Section 8 of the Waterfront Commission Act imposes certain restrictions on non-collective bargaining activities of labor unions if certain persons are chosen as officers or representatives of that union. By the same token, the state imposes such restrictions or similar restrictions by incarcerating a person for violation of law who might have been elected to represent a labor union.

A second yardstick was laid down in this Court by *Allen Bradley Local* v. *Wisconsin Employment Relations Board, supra.* This is the yardstick of compatibility. The Court refused to strike down a Wisconsin statute limiting picketing on the ground that the state system of regulation could be reconciled with the federal act and the two as focused together consistently stand. It is respectfully submitted that Section 8 of the Waterfront Commission Act can stand together with Section 7 of the National Labor Relations Act since the purpose of both acts is to guarantee to the individual working man honest representation, free from improper pressures by employers and also free

from hoodlum and racketeer domination within his own union.

In the *Allen Bradley* case, *supra*, the Court also held that before striking down a state statute prohibiting certain conduct, it must be shown that the freedom to engage in such conduct is so essential or intimately related to the realization of the guarantees of the federal act, that the denial of that freedom would be an impairment of the federal policy. To fall within this test, appellant must argue that the federal legislation contemplates a policy making it essential for employees to be free to choose ex-felons as their representatives. It is respectfully submitted that no such condition is within the purview of the federal acts.

B) The Right of the States of New York and New Jersey to Enact the Waterfront Commission Act Has Been Upheld in the State and Federal Courts.

Since the enactment of the Waterfront Commission Act in 1953, it has been the subject of a barrage of legal actions challenging various portions of it on a myriad of constitutional grounds. In almost all of these attacks, the claim of preemption and supremacy were raised and rejected. These cases are impressive in their unanimity, holding that the Waterfront Commission Act in its various parts and *in toto*, is a valid exercise by the states of their police powers to meet a local emergency. Some of the cases in which these matters were advanced were as follows:

Lenihan, et al. v. *Waterfront Commission*, 116 F. Sup. 401 (S. D. N. Y. 1953);

Lenihan, et al. v. *Waterfront Commission*, 116 F. Sup. 683 (S. D. N. Y. 1953), certiorari denied 347 U. S. 439;

Staten Island Loaders, Inc. v. *Waterfront Commission*, 117 F. Sup. 308 (S. D. N. Y. 1953), certiorari denied 347 U. S. 439;

O'Rourke, et al. v. *Waterfront Commission*, 118 F. Sup. 236 (S. D. N. Y. 1954);
Bradley, et al. v. *Waterfront Commission*, 130 F. Sup. 303 (S. D. N. Y. 1955);
Hazelton v. *Murray*, 21 N. J. 115 (1956);
International Longshoremen's Association v. *Hogan*, 3 Misc. 2d 893, 156 N. Y. S. 2d 512;
Local 824, I.L.A. (Ind.) v. *Waterfront Commission*, App. Div. 2d , N. Y. S. 2d (1958).

In the second *Lenihan case, supra*, 116 F. Sup. 683, Judge AUGUSTUS HAND wrote at page 685:

> "Since we hold the act as within the police power of the state, the numerous objections to it generally based on violations of the Constitution would all seem to be without foundation. This is a new type of regulation, drawn to meet an emergency and reasonably related to the public interest."

After this Court denied certiorari in both the second *Lenihan* and the *Staten Island Loaders* case, 347 U. S. 439, Judge KAUFMAN wrote in *Bradley* v. *Waterfront Commission, supra*, 130 F. Sup. 303, 311-312:

> "The last contention of the plaintiffs is that article 12 and the amendment conflict with the Wagner and Taft-Hartley Labor legislation of the federal government, and that therefore, the former are inoperative under the supremacy clause * * * the Court is of the view that the supremacy claim is insubstantial. It is to be noted that the very same claims of supremacy stated as such or in the guise of a pre-emption contention were made in the Lenihan and Staten Island Loaders Cases."

Finally, the identical statute was under attack in the State of New Jersey on much the same grounds. In *Hazelton* v. *Murray, supra,* Mr. Justice BRENNAN, writing for the unanimous Supreme Court of New Jersey, rejected the various constitutional arguments made against Section 8, including those of preemption and supremacy, in these words:

> "None of these grounds has substance. The United States Supreme Court has recently sustained federal court decisions adjudging that the Compact Act in its entirety is a reasonable exercise of the police power of the States of New York and New Jersey and thus has established the invulnerability of Section 32:23-80 to all the grounds of attack leveled against it by appellant. (Citing cases) Especially pertinent is the holding in Lenihan that there is no constitutional infirmity in the provisions of the contract authorizing the Waterfront Commission in its discretion to deny registration to longshoremen who have been found guilty of specified crimes. 'Since we hold the act is within the police power of the state, the numerous objections to it generally based on violations of the Constitution would all seem to be without foundation. This is a new type of regulation, drawn to meet an emergency and reasonably related to the public interest.' 116 F. Supp. at page 685."

C) The Instant Case Is Not Controlled by the Decision of This Court in *Hill* v. *Florida*, and Is Readily Distinguishable from It.

Appellants rely heavily on the decision of this Court in *Hill* v. *Florida*, 325 U. S. 538 (1944). This case dealt with a Florida statute requiring business agents to obtain a license from a state agency and also for labor unions to file certain reports with state agencies. For violation of these

laws, the agent and/or the union could be enjoined from functioning within the state of Florida. At the outset, it should be pointed out that the proceeding in *Hill* v. *Florida* commenced when the Attorney General of Florida sought to enjoin one Hill from functioning as a business agent on behalf of a labor union. This is not the case in the matter at bar. Further it should be pointed out, that there was no showing of any peculiar local condition existing in Florida at the time of the enactment of this legislation which would warrant the exercise of the police powers of the state of Florida. The *Hill* case was on its face a licensing statute. This is not the case with Section 8 of the Waterfront Commission Act.

Furthermore, upon remittitur to the Court of original jurisdiction in Florida following the decision of this Court in 1944, the judgment of the Court below was modified so as to strike out the provisions of the Florida statute insofar as they related to collective bargaining agents only, but were otherwise undisturbed. During the intervening years the Florida statute has applied to all union agents who do not engage in collective bargaining activities as such. There is no showing here that this plaintiff, George De Veau, was in any way connected with collective bargaining activities on behalf of his union or any other.

D) Congress Recognized the Existence of a Uniquely Local Condition and Approved the Efforts Made Under the Police Powers of New York and New Jersey to Correct It, When It Gave Consent to the Waterfront Commission Compact.

Section 8 of the Waterfront Commission Act was enacted by the Legislature of the State of New Jersey on June 30th, 1953 as Chapter 202 of the Laws of 1953. On the same date, the Legislature of the State of New York approved the same provisions as Chapter 882 of the Laws of

1953. Subsequent to the enactment of this Section by the Legislatures of New York and New Jersey, hearings were held before Congress in connection with the proposed ratification of the By-State Waterfront Compact. At these hearings many witnesses appeared who explained in detail the situation that had been found to exist in the Port of New York and the legislation that had been enacted by the States of New York and New Jersey in an effort to control this local problem. Included among the legislation so explained to the members of Congress prior to the Congressional approval of the Waterfront Compact was Section 8 of the Waterfront Commission Act.

In hearings before Sub-Committee 3 of the Committee on the Judiciary, House of Representatives, on H.R. 6286, H.R. 6321, H.R. 6343 and S. 2383, 83rd Cong., 1st Sess. (1953), p. 47, Governor Driscoll of New Jersey explained in detail the workings of Section 8, and urged its necessity. A similar statement was made at page 108 by Mrs. Elinore M. Herrick representing the Commerce and Industry Association of New York, Inc. It is interesting to note that in the same hearings, the general counsel of the I.L.A., Mr. Louis Waldman protested most vigorously against the approval of the compact and specifically called the attention of the members of the Congress to Section 8 and in so doing raised identical questions presented by this appeal, i.e., that Congress had preempted the field and that the statute was in conflict with the decision of this Court in *Hill* v. *Florida* (*supra*).

In spite of this, and in fact in the face of the identical argument now raised by the appellant both Houses of Congress recognized that a local situation existed which required the exercise of Police Powers of the states involved and recommended consent of the compact without any reservation whatsoever. S. Rep. No. 583, 83rd Cong., 1st Sess. (1953); H. Rep. No. 998, 83rd Cong., 1st Sess. (1953).

As a result, and after the enactment of Section 8 by the States of New York and New Jersey and a full explanation of the reason and function of this Section, the Congress on August 12, 1953 approved the New Jersey and New York Waterfront Commission Compact in clear and unmistakable language:

> "The consent of Congress is hereby given to the Compact set forth below to all of its terms and provisions, and to the carrying out and effectuation of said Compact, *and enactments in furtherance thereof.*" (Emphasis added) (67 Stat. 541)

In view of the fact that the Congress saw fit to approve the legislation knowing full well of the enactment of Section 8 of the Waterfront Commission Act and knowing the objections which are currently raised to the statute and approving the enactment of local laws to meet local conditions, can it be logically said that Congress had so preempted the field as to bar the states from taking his action?

POINT II

There is no conflict between Section 8 and the Disclosure Act of 1959.

A) Appellant's Claim That Section 8 Conflicts With the Disclosure Act of 1959 Is Not Properly Before This Court Since It Was Not Raised Below.

In neither the Notice of Appeal or the jurisdictional statement did the appellant in this case raise any claim of conflict or preemption by reason of the enactment of the Labor-Management Reporting and Disclosure Act of 1959, for the simple reason that this legislation was enacted after the decision by the Court of Appeals hearing.

It is well settled that this Court in reviewing decisions of State Courts will consider only those federal questions which were raised and dealt with in the State Courts and this is so even though the question is one arising under the same clause of the Constitution with respect to which other questions were presented. *Wilson* v. *Cook*, 327 U. S. 474 (1946).

In *McGoldrick* v. *Compagnie Generale Trans-Atlantique*, 309 U. S. 430 (1939), this Court laid down a firm rule with respect to reviewing decisions of State Courts:

> "In the exercise of our Appellate Jurisdiction to review the action of State Courts, we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous *and error is not to be predicated upon their failure to decide questions not presented.* * * * In cases coming here from State Courts from which a State statute is assailed as un-Constitutional, there are reasons of peculiar force which should lead us to refrain deciding questions not presented or decided in the highest Court of the State whose judicial action we are called upon to review. Apart from the reluctance with which every Court should proceed to set aside legislation as un-Constitutional on grounds not properly presented, *due regard for the appropriate relationship of this Court to State Courts requires us to decline to consider and decide questions affecting the validity of State's statutes not urged or considered there.* It is for these reasons that this Court, where the Constitutionality of a statute has been upheld in a State Court, consistently refuses to consider any grounds of attack not raised or decided in that Court." P. 434 (Emphasis added)

This rule has been adhered to by this Court even though an event intervening between the time of the decision of

the highest Court in the State below and the argument of appeal to this Court makes possible a new argument. *State Farm Mutual Insurance Co. v. Duel*, 324 U. S. 154 (1945).

Since the question was not presented to the Court of Appeals of the State of New York initially and became argument only through the intervening event of the enactment of the legislation, it is respectfully submitted that the matter is not properly before this Court. Further, it should be pointed out that the question is not *res judicata* and that any opinion given by this Court would be in the nature of an advisory opinion.

B) Even if the Question of Preemption by the Disclosure Act of 1959 Were Before This Court, There Would Be No Preemption of Section 8.

The Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519) expressly provides in Section 103:

> "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any Court or other tribunal, or under the Constitution and By-Laws of any labor organization."

Furthermore, Section 603(a) provides:

> "Except as explicitly provided to the contrary no acts shall limit or reduce the responsibilities of any labor organization or any officer, agent, shop steward or other representative of a labor organization or of any trust in which a labor organization is interested, under any other federal law or under laws of any State, and, except as explicitly provided to the contrary, nothing in this act shall take away any right or bar the remedy to which m mbers of a labor organization are entitled under such other federal law or law of any state."

In those areas where Congress felt it necessary to completely preempt the States from acting contrary to federal law, this fact was expressly spelled out in the legislation. Samples of this may be found in Section 403 concerning union elections and in Section 306 concerning union trusteeships.

It should be borne in mind that Congress enacted this legislation after hearing evidence of certain conditions which existed in various parts of the country. It still must be borne in mind that the specific facts governing the Port of New York have been well established to the satisfaction of Congress at the time of the approval of the Waterfront Commission Compact. When Congress enacted the Labor-Management Disclosure Act of 1959 they were aware of the existence of Section 8 of the Waterfront Commission Act and their silence in discussing it can not be said to be a clear manifestation of an intent to exclude state action.

The enactment of Section 504(a), effectively refutes the contention that Section 8 of the Waterfront Commission Act conflicted with Section 7 of the National Labor Relations Act. Such a situation was forecast with startling accuracy by Mr. Justice FRANKFURTER's dissenting opinion in *Hill* v. *Florida*, 325 U. S. 559-560 some fifteen years ago. Mr. Justice FRANKFURTER said:

> "If Congress tomorrow chose to subject labor organizations and their officers to regulations similar to those dealt with in the Florida law, it could hardly be suggested that the Wagner Act, as it now stands already covers these subjects. Specifically if Congress were to make certain requirements for the filing of reports by labor organizations that seek to avail themselves of the rights defined by the Wagner Act, and also were to devise a system of identification and licensing of authorized representatives of the unions, one would be

hard put to find any thing in the Wagner Act to prove that it had already dealt with these matters. Congress may well believe that there is such a difference in local conditions as to make it desirable to leave treatment of these matters to the different localities. *In any event since these subjects are outside of the Wagner Act for the purpose of making additions by federal law they cannot be inside it to justify nullification of the Florida law.*" (Emphasis added)

It requires substitution of but a few words to make the reasoning of that decision applicable to the case at bar.

Can it now be said that New York and New Jersey's efforts to correct the abuses of labor union domination by convicts and felons should be stricken down because they were more alert to the situation by some seven years than was the Congress?

POINT III

Section 8 of the Waterfront Commission Act is designed and reasonably adapted to correct evils which the Legislatures of the States of New York and New Jersey and the Congress of the United States found to exist in the Port of New York and is therefore a proper and valid exercise of the police power of the State of New York.

It has long been accepted law that a state may regulate and control certain acts and activities within its own borders for the protection of the health, safety and general welfare of its citizens. Due process of law is observed if the state in so regulating activities or conduct is not unreasonable, arbitrary or capricious and selects means that have a real and substantial relation to the object sought to be obtained. *Nebbia* v. *New York*, 291 U. S. 502, 525

(1933). This Court has repeatedly stated that it will not substitute its discretion for that of a state legislature in determining whether or not the means shown are the best or wisest available, but will look to the reasonableness of the legislation in connection with legitimate legislative purposes. Where there is a conflict between the rights of individuals and the regulations, this conflict must be viewed in the light of the best interests of the entire community and the reasonableness of the remedy of the evil.

A) Long and Exhaustive Hearings Preceding the Enactment of Section 8 Revealed That Labor Unions Within the Port of New York Were Controlled and Dominated by Known Criminals.

In 1951, the New York State Crime Commission joined with the New Jersey Law Enforcement Council to investigate racketeering and other conditions rampant in the Port of New York. The New York Crime Commission heard more than seven hundred (700) witnesses in over one thousand (1,000) executive sessions and heard one hundred and eighty-eight (188) witness in twenty (20) days of public hearings. Five (5) volumes of testimony totaling 3,895 pages were recorded.

In the *Fourth Report of the New York State Crime Commission*, Leg. Doc. No. 70 (1953), pp. 7, 8, 9, 23-25, they concluded that the Port of New York was losing its competitive position as a shipping center because of the crime conditions on the waterfront. The report set forth in detail the dominance of criminal elements over waterfront labor unions and that as a result of this dominance the funds of the international and the various locals were misused and mishandled.

The findings and recommendations of the New York State Crime Commission were concurred in the report of

the New Jersey Law Enforcement Council (June 19, 1953). Thereafter, the Governor of New York held two (2) days of public hearings on June 8th and 9th, 1953 on the recommendations of the New York State Crime Commission.

As a result of these findings, the legislatures of the State of New York and New Jersey enacted the Waterfront Commission Act. In the State of New York this act was passed as Chapters 882 and 883 of the Laws of 1953. Part I of this act is a compact between the States of New York and New Jersey. Parts II and III are legislation implementing the compact.

Section 8 of the Waterfront Commission Act (McKinney's Unconsolidated Laws, Section 6700-ww) was enacted the 30th day of June, 1953. The identical provision was enacted in New Jersey as Chapters 202 and 203 of the Laws of 1953 (N.J.S.A. 32:23-80) on the 30th day of June, 1953.

Thereafter, hearings were held before committees of the Congress of the United States in connection with the approval of the compact. At the time of these hearings, Governor Alfred E. Driscoll of New Jersey summed up the results of the investigations which were the basis for this compact.

> "In brief, we are dealing with a unique situation. There is no other industry in the nation which has become so infested by underworld characters. There are no other working conditions in which honest American working men have fallen so completely under the domination of known criminals. Nowhere have the normal forces of law and order and the usual methods of industrial relations failed so completely. While both states have been reluctant to enter upon any new regulatory function, the conditions are obviously those for which the police power of the states is meant to be used." (*U. S. Congressional House Committee on Ju-*

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 71.

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR. as District Attorney of Richmond County.

APPELLANT'S REPLY BRIEF.

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diciary Hearings before Subcommittee No. 3—1953, New Jersey-New York Waterfront Compact Hearings, p. 47.)

B) The Exclusion of Convicted Felons Caused by Section 8 of the Waterfront Commission Act Is Not Unreasonable or Arbitrary but Is Based on Facts Established to the Satisfaction of the Legislatures of the States of New York and New Jersey and the Congress of the United States.

It is conceded by even the appellant that a state may within its police powers prescribe qualifications for those practicing certain professions and occupations and that a state legislature may declare that whoever has violated the criminal laws has conclusively established a lack of qualifications for such a position. *Hawker* v. *New York,* 170 U. S. 189 (1898). The appellant has also stated, quite correctly, that this Court in the *Hawker* case held that such a standard is not an arbitrary or fanciful rule but one appealing to a well-recognized fact of human experience.

If any further proof were required that the criterion of felony conviction established by Section 8 of the Waterfront Commission Act is not arbitrary, capricious, or fanciful, it can be found spread upon the record of the hearings that preceded the enactment of this legislation by the States of New York and New Jersey and the hearings before the Congress on the approval of the Waterfront Commission Compact. In the hearings before Sub-Committee No. 3 of the Committee on the Judiciary, House of Representatives, on H.R. 6286, H.R. 6321, H.R. 6343 and S. 2383, 83rd Cong., 1st Sess. (1953), Mr. Austin J. Tobin, Executive Director of the Port of New York Authority, noted that the record had shown "that the most dangerous place for recidivism in this state is on the waterfront and above every place the waterfront is no place for a criminal" (p.

88). The Rev. John Corridan of the Xavier Institute of Industrial Relations, who has devoted years of study to the problems of the working men in the Port of New York stated quite bluntly that an ex-convict could not go straight on the waterfront if he wished to keep his job, but that he was forced to play ball with the boys (p. 97).

The Senate Sub-Committee explicitly found the need and reasonableness of such qualifications as a result of its own hearings:

> "Criminal elements in criminal activities are firmly entrenched on the waterfront, primarily through their grip on the organized labor movement. For many years it has been generally accepted that the place for an ex-convict to find employment is around the docks. This, standing alone, would not be objectionable; no doubt many men who have paid their debts to society have been able to make a new start in such employment. But in this instance the scales have tipped the other way: The waterfront is not where a man can 'go straight'—it is where he can 'keep crooked'. Criminals whose long records belie any suggestion that they can be reformed have been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Under their regimes gambling, the narcotics traffic, loan-sharking, short ganging, payroll 'phantoms', the 'shake-down' in all its forms and the brutal ultimate of murder—have flourished virtually unchecked. S. Rep. No. 653, 83rd Cong., 1st Sess. (1953), p. 7.)"

Thus it can be seen that far from being an arbitrary, capricious or fanciful rule, Section 8 of the Waterfront Commission Act in its exclusion of ex-felons from positions of influence in labor unions is seeking to eradicate a very real and recognizable evil. While rehabilitation and redemption

of individuals who have transgressed the law are much to be desired, it is respectfully submitted that such redemption and rehabilitation can only take place in the proper climate by the avoidance of certain "occasions of sin". In view of the established fact that the previously existing system of felon dominated labor unions contributed to recidivism and worked against the redemption and rehabilitation of the men employed on the waterfront, Section 8 can hardly be deemed arbitrary or capricious.

It should be noted that Section 8 of the Waterfront Commission Act is not the only statute that deprives De Veau of employment on the waterfront. Prior to his suspension by the International, De Veau was an official of a local union covering those waterfront workers employed as checkers. However, De Veau was not eligible to work in the Port of New York as a checker. In order for anyone to accept employment as a checker under the Waterfront Commission Act he must be registered pursuant to that act, which provides in part that no person shall be included in the Longshoremen's register as a checker.

> "(b) if the applicant has, without subsequent pardon, been convicted by a Court of the United States or any state or territory thereof, of the commission of, or the attempt of conspiracy to commit treason, murder, manslaughter, or any other felony or misdemeanor." (McKinney's Unconsolidated Laws of New York, Section 6700-tt-14)

C) Section 8 of the Waterfront Commission Act is Neither an *Ex Post Facto* law or a Bill of Attainder.

The decision of this Court in *Hawker* v. *Peo. of New York* (*supra*) would seem to dispose of all objections to Section 8 of the Waterfront Commission Act on the grounds of *ex post facto* law and bill of attainder.

As it was pointed out above this Court recognized and upheld a New York statute prohibiting anyone from engaging in the practice of medicine in the State of New York, who had previously been convicted of a felony of any kind at some earlier date. Similar restrictions have been imposed in the State of New York upon almost every learned profession in varying occupations and callings down to that of notary public. All of these statutes have been upheld and none have been classified as bills of attainder or *ex post facto* laws.

It is respectfully submitted that Section 8 of the Waterfront Commission Act, likewise is free from such attack, since such an impediment can only attach to penal legislation. Section 8 of the Waterfront Commission Act is not penal in nature. Analysis of this was recently made in this Court in *Trop* v. *Dulles*, 356 U. S. 86 (1958). Since the evident purpose of Section 8 of the Waterfront Commission Act is to protect labor unions from domination by ex-felons, rather than punishment of ex-felons, Section 8 cannot be construed to be penal in nature and hence cannot be held to be either an *ex post facto* law or a bill of attainder.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals of the State of New York upholding the validity and constitutionality of Section 8 of the Waterfront Commission Act under the Constitution of the State of New York and the Constitution of the United States should be affirmed.

Respectfully submitted,

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February , 1960.

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Supreme Court of the United States

OCTOBER TERM, 1959.

No. 71

GEORGE DE VEAU,

Appellant,

vs.

JOHN M. BRAISTED, JR.,
as District Attorney of Richmond County.

APPELLANT'S REPLY BRIEF.

We confine ourselves to matters calling for reply.

I.

The appeal is not moot and the appeal should be determined on the merits.

The brief of *amicus curiae* Waterfront Commission of New York Harbor at page 8 states that Local 1, I. L. A. (Ind.), now Local 1, I. L. A. (A. F. L.-C. I. O.), is beyond the jurisdiction of the appellee District Attorney. This statement is without merit. The District Attorney's jurisdiction includes all crimes committed in his county. The crime declared by Section 8 has no relationship whatsoever to the location of the union's office. The crime is in the collection of dues while an officer of the union is a felon.

The collection of dues continues within the jurisdiction of appellee and the reinstatement of appellant would immediately place the appellant and union in the same position they were at the institution of the action.

II.

No administrative remedy is open to appellant.

The Court of Appeals has determined that appellant had no administrative remedy which he could pursue. It stated (R. 51) as follows:

> "Our rejection of plaintiff De Veau's complaint is not based on any holding that he had failed to exhaust his 'administrative remedies'. It is said that he should have applied to the Parole Board for a 'certificate of good conduct' (Executive Law, §242) since the section 8 prohibition does not apply to one who after conviction has received such a certificate. But since the granting of such a certificate by the Parole Board would be an act of grace and discretion and not of duty or right, we hold that plaintiff could test the constitutionality of the statute without first applying for such a certificate."

III.

The precise questions presented by this appeal never have been before this Court.

Appellee, in his brief (pp. 8, 9) cites numerous cases to establish the validity of Section 8. However, the issues involved herein, never have been adjudicated by this Court. For the sake of brevity, we refer to pages 1-3 of appellant's Brief In Opposition to Motion to Dismiss Appeal. We confine ourselves to the new cases cited in appellee's brief.

Linehan, et al. v. *Waterfront Commission*, 116 F. Sup. 401, was an action by appellant herein, and others, to restrain the officials of the State of New York from any enforcement of Section 8. Weinfeld, District Judge, dismissed the action on the grounds that plaintiffs failed to establish any immediate likelihood of irreparable damage requiring the intervention of a court of equity.

O'Rourke, et al. v. *Waterfront Commission*, 118 F. Sup. 236, involved Article V of the Act requiring the licensing of pier superintendents and hiring agents.

Local 824, I. L. A. (Ind.) v. *Waterfront Commission*, 188 N. Y. S. 2d 562, 6 N. Y. 2d 861, is the latest case decided by the Court below in which Section 8 was involved. The instant case was decided by a unanimous Court of Appeals on February 26, 1959. The *Local 824* case was decided May 29, 1959 approximately three months thereafter by a divided Court.

The dissenting opinion of Judge Froessel, in which Judge Van Voorhis concurred, follows:

> "I do not think we should dismiss these appeals on the ground that the subpoenas were effective whether or not section 8 of the Waterfront Commission Act, McK Unconsol. Laws, §6700-ww, is constitutional, and that hence a constitutional question is not directly involved. Whether or not the commission *had to* rely upon section 8 to issue these subpoenas, the fact is that it *did so rely* upon section 8 and the very purpose of the investigation was to determine 'whether the aforesaid Section 8 of the Waterfront Commission Act was being violated'. The affidavit of the official who authorized the investigation relied squarely on section 8 as authority for invoking the broad investigatory powers of the commission. He stated that section 8 was enacted 'in order to eliminate some of the evil conditions on the waterfront', and that 'In order to

execute the mandate of the Waterfront Commission Act that it eliminate the evil conditions to have existed on the waterfront, the Waterfront Commission is clothed with broad investigatory powers'.

If section 8 is unconstitutional, then it seems to me that the subpoenas issued to determine whether section 8 was being violated must also fall. I do not think the investigating powers of the commission can be justified out of the context of the particular evil being investigated. These powers were conferred to aid in the elimination of particular evils, and their exercise must be judged in the context of the particular evil being investigated. Here, the powers were invoked specifically to determine whether section 8 was being violated, *and if section 8 is invalid, there is no basis to support the particular exercise of the investigatory powers. If section 8 falls* so must the subpoenas fall, and hence I feel that a constitutional question is directly involved." (Emphasis supplied.)

The foregoing opinion clearly indicates a doubt in the mind of at least the two dissenting judges as to the constitutionality of Section 8.

IV.

The Labor-Management Reporting and Disclosure Act is properly before this Court.

This Court may properly consider changes in either fact or law supervening since the judgment was entered. In *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23, 26, 27, this Court speaking through Mr. Chief Justice Hughes, stated:

"For the present purpose, we may assume, without deciding, that the determination of the court below was correct upon the record before it and in

the light of the law as it then stood. But it is our duty to consider the amended statute and to decide the question in harmony with its provisions, if found to be applicable. The controlling rule was thus stated by Chief Justice Marshall in United States *v.* The Peggy, 1 Cranch (US) 103, 110, 2 L ed 49, 51:

'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'"

See also,

Villa v. *Von Schaick*, 299 U. S. 152, 155;
Patterson v. *Alabama*, 294 U. S. 600, 607.

V.

There is no authority granted to the Waterfront Commission to permit a convicted felon to serve as an officer.

The Waterfront Commission, on pages 45-46 of its brief as *amicus curiae* states:

"The plan of Section 8 is that a convicted felon may not serve as an officer or agent of a waterfront union unless, in substance, the local state officials find that it is appropriate for him to become an officer or agent of a waterfront union in the port of New York. The local officials are, of course, the persons

> most conversant with the New York waterfront. They are the most knowledgeable concerning the current problems of the port of New York and the history and present activities of waterfront criminal elements and their associates. Thus, the local state officials charged with the responsibility are in the best position to determine whether it would be compatible with the purposes and objectives of the Waterfront Commission Act for a particular felon to become eligible to serve as an officer or agent of a waterfront union in the port."

This statement is misleading. There is no authority in the Waterfront Commission to permit a felon to serve. Section 8 is a complete bar.

VI.

Section 8 is a penal statute and therefore a bill of attainder and *ex post facto* legislation.

Appellee, at page 23 of his brief cites *Trop* v. *Dulles*, 356 U. S. 86, to show that Section 8 is not a bill of attainder or *ex post facto*. Appellant respectfully refers to pages 5-7 of his Brief in Opposition to motion to Dismiss Appeal in answer thereto.

VII.

Section 8 is not included in the Compact approved by Congress. Article XV of the Compact clearly recognizes the right of employees to select representatives of their own choosing, without limitation.

Article XV of the Waterfront Commission Compact which was approved by Congress, reads, in part, as follows:

"§6700-00. COLLECTIVE BARGAINING SAFEGUARDED.

1. This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike." McK. Unconsol. Laws 6700-00.

The following explanation of Article XV, can be found in McKinney's Consolidated Laws of New York Annotated, Book 65, Part 2, following Section 6700zz in the Cumulative Annual Pocket Part:

"COLLECTIVE BARGAINING SAFEGUARDED.

There is nothing in the statute which is designed or can reasonably be construed to interfere in any way with the right of the waterfront industry to select its own employees, or with the right of industry and labor to bargain collectively and agree on any method for the selection of longshoremen and port watchmen by way of seniority, experience, regular gangs or otherwise in conformity with the license, registration and employment information center provisions of the statute. Because of the apparent misunderstanding of this point reflected at the public hearings express declaration to this effect has been included as Article XV in the Compact.

Similarly, to obviate any misunderstanding, Article XV includes an express statement that the statute is not designed and shall not be construed to limit labor's rights." (emphasis supplied)

The foregoing explanation of Article XV is contained in:

"SUMMARY OF WATERFRONT COMMISSION ACT.

Prepared by representatives of the State Crime Commissions of New York and New Jersey; the Port of New York Authority, and the Governors' offices of New York and New Jersey."

It is clear from the foregoing, that it was the intent, when Congress approved the Compact, to preserve the right granted by Section 7 of the National Labor Relations Act, of employees to select representatives of their own choosing. It was after the approval of the Compact by Congress, that Section 8 became effective and Section 8 has never been approved or in any way sanctioned by Congress.

Conclusion.

The judgment should be reversed and Section 8 declared unconstitutional.

Respectfully submitted,

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